

# Takings, Fairness, and Farmland Preservation

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*Farmland preservation has become a growing societal concern in recent years, most clearly seen in the variety of state and local efforts to address conversion problems. Although each of these programs has a legitimate role to play in preserving farmland, the need to restrict landowners ability to sell makes agricultural zoning a necessary and central component of preservation efforts. Agricultural zoning is controversial, however, because of the significant financial impact it often imposes on landowners under the greatest conversion pressure. In particular, it is commonly subject to two related concerns: that the substantial diminution in value constitutes an unconstitutional taking and, even if constitutional, that the substantial economic burdens are unfair.*

*Professor Cordes examines each of these concerns and demonstrates that agricultural zoning should not normally constitute a taking or be viewed as inherently unfair, despite substantial economic impacts on landowners. Most agricultural zoning should not be a taking under Supreme Court takings jurisprudence, which focuses on whether property remains economically viable. This has been borne out by lower court decisions that have consistently rejected takings challenges to agricultural zoning. Similarly, agricultural zoning is not inherently unfair even when resulting in substantial economic loss. Such losses must be evaluated in a broader regulatory framework, in which much of the property values were created by government "givings" and in which landowners benefit from other regulatory schemes. Moreover, our legal system has long recognized that property ownership is subject to the broader public interest, and reasonable landowner expectations must incorporate the possibility of regulation to further such interests.*

## I. INTRODUCTION

The United States is converting farmland at substantial rates.<sup>1</sup> Although several factors account for this conversion, the basic reason for most farmland conversion is simple economics: as the suburbs expand, farmland will often bring a higher price in alternative, more intensive land uses, such as residential or commercial. Whatever its broader worth to society as farmland, to the immediate parties involved the land is more valuable converted. This has often included some of America's best and most productive farmland.<sup>2</sup>

Whether farmland conversion presents a societal problem is subject to some

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<sup>1</sup> See generally A. ANN SORENSEN ET AL., AMERICAN FARMLAND TRUST, FARMING ON THE EDGE (1997) (discussing the report of the American Farmland Trust that documented substantial conversion of America's best farmland); *infra* text accompanying notes 14-43.

<sup>2</sup> SORENSEN ET AL., *supra* note 1, at 2-3, 8-20.

debate.<sup>3</sup> Nonetheless, all levels of government have perceived farmland conversion as a problem and have responded with a variety of programs to slow and control the rate of conversion.<sup>4</sup> Some of these might be viewed as voluntary incentives to encourage farmers not to convert farmland, such as special tax incentive programs or recognition of agricultural districts. These provide financial incentives for farmers to help alleviate conversion pressure. Similarly, right-to-farm laws protect farming activities against nuisance actions based on encroaching development.

Although each of the above are important components of farmland preservation efforts, commentators have noted they are often ineffective in stopping conversion.<sup>5</sup> As a practical matter such voluntary incentives are rarely enough to stop conversion in the long run, since they only partially offset the

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<sup>3</sup> Several major reports in recent years have documented the loss of farmland and concluded that it presents a major problem. *See id.* at 2-3, 8-20; *see generally* U.S. DEP'T OF AGRIC. & PRESIDENT'S COUNCIL ON ENVTL. QUALITY, NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981), [hereinafter NALS]. This perception is joined by a substantial amount of both academic and popular commentary. *See generally, e.g.*, TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLANDS (1997); Lawrence W. Libby, *Farmland Protection for Illinois: The Planning and Legal Issues* 17 N. ILL. U. L. REV. 425 (1997); Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237 (1998). A number of commentators, however, have questioned whether farmland conversion is in fact a problem, or is at least to the degree often stated by proponents of preservation. *See generally, e.g.*, Orlando E. Delogu, *A Comprehensive State and Local Government Land Use Control Strategy to Preserve the Nation's Farmland is Unnecessary and Unwise*, 34 U. KAN. L. REV. 519 (1986); William A. Fischel, *The Urbanization of Urban Land: A Review of the National Agricultural Lands Study*, 58 LAND ECON. 236 (1982); Ralph E. Heimlich & Kenneth S. Krupa, *Changes in Land Quality Accompanying Urbanization in U.S. Fast-Growth Counties*, 49 J. OF SOIL & WATER CONSERVATION 367, 373-74 (1994); Urban Land Inst., *Has the Farmland Crisis Been Overstated? Recommendations for Balancing Urban and Agricultural Land Needs*, in 1983 ZONING AND PLANNING LAW HANDBOOK 235 (Fredric Strom ed., 1983).

<sup>4</sup> The federal government has initiated several actions directed toward farmland preservation, including passage of the Farmland Protection Policy Act in 1981, 7 U.S.C. §§ 4201 to 4209 (1994), and passage of the Federal Agricultural Improvement and Reform Act of 1996 (FAIRA), Pub. L. No. 104-127, 110 Stat. 888 (codified as amended in scattered provisions of Title 7 of the United States Code). All 50 states have enacted a variety of measures designed to preserve farmland, including tax incentive provisions, right-to-farm laws, agricultural districting, and special Purchase of Development Rights (PDR) programs. *See infra* Part I.C. Local governments also extensively regulate farmland, usually through zoning provisions. *See, e.g.*, NALS, *supra* note 3, at 63-75 (discussing varieties of local government efforts to preserve farmland).

<sup>5</sup> *See* SARAH E. REDFIELD, VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES 96-97 (1984); William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521, 550; James B. Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures*, 21 WASHBURN L.J. 478, 493 (1981-1982).

financial benefits of conversion.<sup>6</sup> At best they only delay conversion, at times subsidizing farmland while it is in a holding pattern. In particular, by letting property owners themselves retain the ultimate decision on whether to convert, such voluntary programs will almost always be ineffective.

Therefore, local governments have increasingly looked to preservation methods that restrict a landowner's ability to convert. In a limited number of instances, local governments have pursued Purchase of Development Rights (PDR) or Transferrable Development Rights (TDR) programs,<sup>7</sup> which at least partially shift the cost of preservation back to the government by providing compensation to the property owner. More commonly, however, government has achieved this through some form of conventional zoning.<sup>8</sup> This in effect restricts any development rights on the part of the property owner without paying compensation.

Although financially prudent for local government, agricultural zoning and other public restrictions on farmland can at times result in substantial diminution in value to landowners. This is particularly true with farmland under the greatest conversion pressure on the urban fringe, where market values might be several times greater if the property can be developed.<sup>9</sup> As a result, two closely related concerns have often been raised by property owners. First, property owners have often challenged such zoning as an unconstitutional taking, especially where substantial diminution in value results.<sup>10</sup> Second, beyond any takings challenge, property rights proponents have argued that restrictions which preclude any development on undeveloped land, including farmland, are unfair where landowners suffer substantial loss in value.<sup>11</sup> In particular, property rights

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<sup>6</sup> See Church, *supra* note 5, at 550.

<sup>7</sup> See Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 135-43 (1998) (discussing successful TDR and conservation easement programs to preserve farmland).

<sup>8</sup> See generally Julian Conrad Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980s*, 21 WASHBURN L.J. 443, 451 (1981-82).

<sup>9</sup> See, e.g., *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360, 1363 (Ill. App. Ct. 1993) (holding that property value doubled if rezoned for development); *Wilson v. County of McHenry*, 416 N.E.2d 426, 429 (Ill. App. Ct. 1981) (describing fivefold increase if agricultural land rezoned for development); *Van Arsdell v. Township of Addison*, 195 N.W.2d 21, 23 (Mich. Ct. App. 1972) (describing at least threefold increase if agricultural land rezoned for development).

<sup>10</sup> See *infra* Part II. B. (discussing state-court review of "takings" challenges to agricultural zoning).

<sup>11</sup> See *Private Property Protection Act: Hearings on H.R. 161 Before the House Agric. Subcomm. on Dep't Operations and Nutrition*, 102d Cong. 97-102 (1993) (testimony of Ben Love on behalf of Nat'l Cattlemen's Assoc.); Stephen C. Fehr, *Montgomery's Line of Defense Against the Suburban Invasion*, WASH. POST, Mar. 25, 1997, at A1 (describing fairness concerns raised by farmers in efforts to preserve farmland in Montgomery County, Maryland); David Helvarg, *Legal Assault on the Environment: 'Property Rights' Movement*, NATION, Jan.

proponents have suggested that agricultural zoning is unfair because it forces a few landowners to bear the cost of preserving farmland for the benefit of many.

This latter fairness argument is an important one for environmental regulation in general, and farmland preservation in particular.<sup>12</sup> Even assuming constitutionality, fairness is an important component in setting policy and affects the political acceptability of alternative outcomes. Moreover, fairness arguments have been at the heart of recent efforts to legislatively expand compensable takings, with farmland issues being an important dimension of that effort.<sup>13</sup>

This Article will examine the validity of agricultural zoning as a technique to preserve farmland, and in particular the extent to which it raises takings and fairness concerns. Its basic premise is that agricultural zoning does not, in most instances, constitute a taking. Moreover, public restrictions on farmland are not inherently unfair, even when they result in a substantial diminution in value. When feasible, alternative techniques such as PDR and TDR programs, which provide at least some offsetting compensation, are appropriate to mitigate the economic impact of zoning and might better balance the respective private and public interests involved. When implemented, these alternative approaches might also be more effective at preserving farmland, since they can more effectively withstand political change and pressure. Yet PDR and TDR programs face significant practical constraints which limit their overall effectiveness as farmland preservation techniques, and in their absence traditional zoning should not be viewed as inherently unfair.

Part II briefly discusses some background issues, including a brief discussion of farmland conversion, some of the arguments for preservation, and a rudimentary overview of preservation techniques. Part III considers whether agricultural zoning might constitute a taking, examining both current Supreme Court analysis and lower court treatment of takings challenges to agricultural zoning. It indicates that under both current Supreme Court takings jurisprudence, as well as lower court treatment of the issue, agricultural zoning will rarely

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30, 1995, at 126, 128 (noting that many political observers see the Farm Bureau as a major force behind takings legislation initiatives).

<sup>12</sup> For an excellent discussion of the need to address fairness concerns in environmental law, including those surrounding property rights, see generally Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705 (1997).

<sup>13</sup> The last decade has seen a significant "property rights" movement in this country designed to expand the scope of compensable takings. This has involved not only court actions, but significant legislative efforts at both the state and federal level to expand takings. Most commonly, this has involved "assessment" statutes which require government officials to assess whether their actions constitute a taking under current judicial standards. A number of states have also considered compensation statutes which would require compensation when government regulation reduces the value of land by a certain percentage, such as 50%. To date such compensation statutes have been passed in only four states. See Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 212-20 (1997).

constitute an unconstitutional taking. Finally, Part IV addresses the issue of fairness in farmland preservation, suggesting three reasons why agricultural zoning should not be viewed as inherently unfair even when substantial diminution in value results. These are the concept of government "givings" that enhance land values in the first instance; recognition of general regulatory reciprocity which mitigates fairness concerns; and the nature of property rights, which has long viewed private interests as being subject to broader public needs.

## II. BACKGROUND

### A. *The Problem of Conversion*

As was mentioned above, the United States is converting farmland at considerable rates. Although occasional warnings were given about the problem in the 1960s and 1970s, the problem gained national attention by the now well-known National Agricultural Lands Study (NALS) in 1981, conducted by the United States Department of Agriculture and the President's Council on Environmental Quality.<sup>14</sup> The study conducted a comprehensive inventory of the nation's agricultural land base as of 1977, looking at conversion patterns, varying quality of farmland, existing agricultural reserves, projected conversion rates, and the future need for farmland. The study estimated that the nation's non-federally owned agricultural land base at that time was 1.36 billion acres, which included 413 million acres of cropland, with the remaining land divided primarily between rangeland, pastureland, and forestland.<sup>15</sup> For purposes of the study, the most important category was the "cropland base," which included the then current 413 million acres of cropland as well as an additional 127 million acres of "potential cropland," comprised of land with high or medium cropland potential from the other categories of land.<sup>16</sup> Thus, the study viewed the nation's cropland base as consisting of 540 million total acres.

The study further examined changes within the agricultural land base, such as shifting of cropland in and out of other agricultural categories.<sup>17</sup> Central to its

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<sup>14</sup> NALS, *supra* note 3.

<sup>15</sup> The agricultural land base consisted of 413 million acres of cropland, 414 million acres of rangeland, 376 million acres of forestland, 133 million acres of pastureland, and 23 million acres of other farmland. *See id.* at 28-29.

<sup>16</sup> *Id.* at 28-30.

<sup>17</sup> For the years 1967-75 the study noted a relatively large amount of land that shifted between different uses within the agricultural land base, including shifting in and out of cropland use. This "indicate[d] considerable flexibility in how American farmers, ranchers and foresters use the nation's agricultural land base." *Id.* at 32. It also noted, however, that often "shifts of land from cropland uses are not considered readily reversible," with only one-third of the land shifted from cropland use during 1967-75 still having high or medium potential as future cropland. *Id.*

study, however, was its finding that three million acres were annually being converted from the agricultural land base to nonagricultural uses—one million acres of which were from the cropland base.<sup>18</sup> More than two-thirds of the land converted to nonagricultural use was attributable to urban build-up and transportation uses, with approximately an additional thirty percent being displaced by “reservoirs, lakes, and other water-impounding facilities.”<sup>19</sup> The study attributed most of this conversion to changing living patterns, noting the substantial spreading of residential development into rural America. It noted that the “highest rates of population growth occurred in the open country and in unincorporated areas,” and were often accompanied by scattered development on large lots.<sup>20</sup>

Although the rate of farmland conversion did not present an immediate threat to the nation’s welfare,<sup>21</sup> the study sounded a substantial alarm about the long-term consequences that would occur if current conversion rates remained unchecked. In particular, it noted that the United States would increasingly be involved with international food markets, which had become an important part of our economic base.<sup>22</sup> Thus, even if current inventories were adequate to meet our own food needs in the foreseeable future, viewed from a more global perspective the rate of farmland conversion was “cause for serious concern.”<sup>23</sup> The study did not recommend a complete stop of conversion, which would have been unrealistic, but did recommend that the nation undertake a number of immediate steps to begin to slow the conversion rate and steer its direction. Although many of the specific recommendations were directed at the federal level,<sup>24</sup> the study recognized that the problem was largely local in nature and encouraged state and local governments to undertake various efforts to control conversion.<sup>25</sup>

The NALS had a substantial impact, giving impetus to passage of the federal Farmland Protection Policy Act in 1981,<sup>26</sup> and reinforcing the already growing concern at the state and local level for the need to protect farmland. Despite its influence, the NALS has been subject to significant criticism.<sup>27</sup> Several responses

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<sup>18</sup> See *id.* at 8, 35–37.

<sup>19</sup> *Id.* at 35.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> See *id.* at 17.

<sup>22</sup> See *id.* at 84.

<sup>23</sup> *Id.* at 85.

<sup>24</sup> See *id.* at 88–97 (discussing recommendations aimed at the federal and national level).

<sup>25</sup> See *id.* at 86 (“These recommendations emphasize the primary roles of states and local governments in conserving agricultural land and the supporting roles which can be played by agencies at the federal level.”).

<sup>26</sup> Farmland Protection Act, 7 U.S.C. §§ 4201 to 4209 (1994). For commentary on the Act, see generally Corwin W. Johnson & Valerie M. Fogelman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563.

<sup>27</sup> See LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 6.03 (1998)

challenged its farmland conversion figures as "either exaggerated or ultimately unimportant,"<sup>28</sup> arguing that less conversion was taking place than reported and that more potential cropland existed than reported. Similarly, critics questioned the NALS's projections about future demand as being exaggerated, and further faulted the study for not considering future increases in crop yield.<sup>29</sup> Even some sympathetic to farmland preservation noted the tenuous basis of some of the study's projections.<sup>30</sup> Indeed, the years since the NALS have shown that some of its projections were overdrawn, especially concerning the state of the agricultural land base as we approach the year 2000. Rather than having reached the limits of all current and reserve cropland, we currently retain sufficient levels of cropland for the immediate future.

Nevertheless, many of the concerns raised by the NALS study remain real today. Indeed, a recent and comprehensive study by the American Farmland Trust (AFT) confirmed the continuing loss of farmland and its potential consequences. Entitled "Farming on the Edge,"<sup>31</sup> the study primarily focused on the "geographic relationship between high quality farmland and development pressure."<sup>32</sup> To do this, the AFT examined conversion patterns for the years 1982–1992, using a "Geographic Information System" database largely based on the Department of Agriculture's National Resources Inventory. The study further analyzed conversion patterns and development pressures within each of the nation's 181 Major Land Resource Areas (MLRAs), geographic regions defined by the USDA as having homogenous characteristics relevant to farming.<sup>33</sup>

Not surprisingly, the AFT study found that every state lost some of its best farmland to urban development during that period.<sup>34</sup> This included four million acres of "prime" farmland that were converted to more intensive land uses.<sup>35</sup> More importantly, however, the study showed that a substantial amount of the country's best farmland was under significant development pressure. Seventy percent of the nation's MLRAs had high quality farmland in proximity to

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(summarizing critiques of NALS, especially that of William Fischel, and responses to the critiques); *see, generally*, JOHN BADEN, *THE VANISHING FARMLAND CRISIS: CRITICAL VIEWS OF THE MOVEMENT TO PRESERVE AGRICULTURAL LAND* (1984) (containing nine essays critical of the NALS study); Fischel, *supra* note 3.

<sup>28</sup> Urban Land Institute, *supra* note 3, at 240 (reviewing various criticisms of the NALS study and challenges to the data).

<sup>29</sup> *See id.* at 244–48; Delogu, *supra* note 3, at 530–33.

<sup>30</sup> *See* Church, *supra* note 5, at 538–40.

<sup>31</sup> SORENSEN ET AL., *supra* note 1.

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* at 4–7. These characteristics include "homogeneous patterns of soil, climate, water resources, land use and type of farming." *Id.* at 6. MLRAs are typically comprised of several million acres. *See id.* at 7.

<sup>34</sup> *See id.* at 5.

<sup>35</sup> *See id.* at 18.

significant development pressure.<sup>36</sup> The mapping system showed a significant portion of the nation's high quality farmland as "threatened," which it defined as "concentrations of prime and/or unique farmland coinciding with the state's most rapidly developing area(s)."<sup>37</sup> This in part reflects that much of the nation's best farmland is near metropolitan areas, but the study also noted that migration back into more rural communities is having a significant impact.<sup>38</sup>

As did the earlier NALS study, the AFT's study raises concerns about the long-term consequences of conversion. Under what it labeled its "worst case scenario," which it acknowledged might never materialize, the United States would become a net importer of food within sixty years.<sup>39</sup> Of more immediate concern was the loss of the current environmental benefits of farmland, such as "open space, wildlife habitat, [and] groundwater recharge."<sup>40</sup> It also noted that loss of prime farmland is often replaced with less suitable land, resulting in environmental damage by clearing forests or draining wetlands, and increased erosion rates.<sup>41</sup> Although the study recognized that development is necessary, the significant and irreversible loss of the benefits of prime farmland made it important that development be directed toward land less suited for high quality agricultural use.<sup>42</sup> The study concluded with an extensive set of recommendations directed at generating additional research and information, strengthening federal preservation efforts, and promoting state and local programs to preserve farmland, especially in those states having land in the top twenty threatened MLRAs.<sup>43</sup>

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<sup>36</sup> See *id.* at 2, 5–8. For purposes of the study, the AFT included within the category of "high quality farmland" both the USDA's category of "prime" farmland and AFT's own definition of "unique" farmland. The USDA's "prime" farmland designation is "defined as land most suitable for producing food, feed, forage, fiber and oilseed crops." *Id.* at 5. To be classified as "prime," land must meet a number of specified criteria, including adequate moisture supply, acceptable acidity, acceptable salt/sodium content, limited flooding, acceptable water tables, and acceptable slope ranges. See *id.* at Glossary (citing USDA-SCS, 1982 NRI). The AFT's "unique" farmland designation was farmland other than "prime" farmland that was "used for the production of specific high-value food and fiber crops[,] such as vegetables, grapes, fruits, nuts, and berries and which therefore had "unique soil and climatic requirements." *Id.*

<sup>37</sup> *Id.* at 4.

<sup>38</sup> See *id.* at 5.

<sup>39</sup> See *id.* at 2. The study in fact based this "worst case scenario" of being a net importer of food within sixty years on conclusions offered at a press conference by the American Association for the Advancement of Science (AAAS), the nation's leading scientific association, at its 1996 annual meeting. See SORENSEN ET AL., *supra* note 1, at 24 n.1 (citing PRESS CONFERENCE: *New Views on Consumption, Population and the Environment*, AMERICAN ASSOC. FOR THE ADVANCEMENT OF SCIENCE, ANNUAL MEETING, Feb. 9, 1996).

<sup>40</sup> SORENSEN ET AL., *supra* note 1, at 20.

<sup>41</sup> See *id.* at 19.

<sup>42</sup> See *id.* at 18.

<sup>43</sup> See *id.* at 21–23. The top twenty MLRAs, from highest to lowest scores, are: Sacramento and San Joaquin Valleys; Northern Piedmont (primarily parts of Maryland, New



## B. Rationales for Preservation

Although a variety of reasons have been given for wanting to preserve farmland from current conversion rates, they generally can be placed in two groups: "food security" concerns and environmental benefits.<sup>44</sup> "Food security"<sup>45</sup> is the idea that farmland conversion threatens our long-term ability to produce sufficient amounts of food to either feed ourselves or respond to future global needs. This was first identified as a significant concern in the NALS study, which raised significant issues regarding the long-term ability of the United States to produce food.<sup>46</sup> It has subsequently found its way into various efforts to preserve farmland, including being articulated as a major rationale in enacting the federal Farmland Protection Policy Act of 1981<sup>47</sup> and some state farmland protection legislation.<sup>48</sup>

The food security issue has been the focus of intense debate during the last two decades. While several recent analyses have noted it as a continuing concern,<sup>49</sup> other commentators have suggested that there is little risk that our

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Jersey, Pennsylvania, and Virginia); Southern Wisconsin and Northern Illinois Drift Plain; Texas Blackland Prairie (eastern Texas); Willamette and Puget Sound Valleys (western Oregon and Washington); Florida Everglades; Eastern Ohio Till Plain; Lower Rio Grande Plain; Mid-Atlantic Coastal Plain (primarily parts of Delaware and Maryland); New England and Eastern New York Upland, Southern Part; Ontario Plain and Finger Lakes (western New York); Nashville Basin (Tennessee); Central Snake River Plains (parts of Idaho); Southwestern Michigan Fruit and Truck Belt; Central California Coastal Valleys; Columbia Basin (primarily parts of Washington); Imperial Valley (southern California); Long Island-Cape Cod Coastal Lowland; Connecticut Valley (primarily parts of Connecticut and Massachusetts); Western Michigan Fruit and Truck Belt. *See id.* at 8-17.

<sup>44</sup> *See* Libby, *supra* note 3, at 426-29 (characterizing the two basic types of rationales for farmland preservation as "food security" and "non-owner services of farmland").

<sup>45</sup> I borrow the term "food security" from Professor Libby. *See id.* at 426. Others have also used it. *See, e.g.,* Tweeten, *supra* note 3, at 247.

<sup>46</sup> *See* NALS, *supra* note 3, at 56-62. The NALS noted numerous uncertainties in projecting the ability to meet food demands in the future, including improving crop yields through possible technological innovations and improved management practices, affecting both future domestic and international needs.

<sup>47</sup> *See* Farmland Protection Act, 7 U.S.C. § 4201(a) (1994) (stating that farmland conversion "may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets").

<sup>48</sup> *See* Illinois Farmland Preservation Act, 505 ILL. COMP. STAT. 75/2 (West 1993 & Supp. 1999) (stating that farmland conversion "reduces future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois"). A number of states have also passed Executive Orders aimed at preserving farmland, typically citing food security concerns as one rationale for the order. *See, e.g.,* Ga. Exec. Order No. 01917 (1981); Mich. Exec. Directive No. 1986-2 (1986).

<sup>49</sup> *See generally* David Pimentel et. al., *Environmental and Economic Costs of Soil Erosion and Conservation Benefits*, 267 SCIENCE 1117 (1995) (analyzing world-wide rates of soil erosion and stating that it poses a major threat to the ability of the world to feed itself in the

country will be unable to feed itself no matter how much conversion takes place.<sup>50</sup> The food security argument can be quite nuanced, however, and take various forms.<sup>51</sup> As noted by Professor Frank Church, "even if the country did begin to reach its full cropland capacity, the consequences would not be immediate starvation but only a gradual increase in the price of food relative to other prices."<sup>52</sup> He also notes that we have a cushion if a food security problem begins to arise, including simplifying our diets, spending a higher percentage of our wealth on food, and cutting back on exports. He concludes that "[a]lthough a serious problem may never materialize, the possibility of a problem justifies at least some concern."<sup>53</sup> Thus, although our domestic food supply might not be realistically threatened, we might be at risk of not being as competitive in international markets or as responsive as we might be to a food crisis elsewhere.<sup>54</sup> Though food will remain available, it will cost more and thus impose other costs

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future); Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237 (1998); David Pimentel & Marci Pimentel, *U.S. Food Production Threatened by Rapid Population Growth*, (last modified Oct. 30, 1997) <<http://www.enviroweb.org/gaia-pc/Pimentel2.html>>.

<sup>50</sup> See Peter Gordon & Harry W. Richardson, *Farmland Preservation and Ecological Footprints: A Critique* (visited Aug. 21, 1999) <<http://www-pam.usc.edu/v1i1a2s1.html>> (discussing theory of two University of Southern California economists who challenge assumptions behind food security concerns and question the need to preserve farmland).

<sup>51</sup> For an excellent and in-depth analysis of the food security issue as of a decade ago, see generally Church, *supra* note 5. Professor Church notes that as of the mid-1980s "the domestic and worldwide supply of food considerably exceed[ed] the demand," with Americans still having millions of acres of potential cropland in reserve. Whether a future food problem would exist depends both on "future supply and demand of food here and abroad and on the future supply of American farmland to produce that food." *Id.* at 522. He then proceeds to analyze the various factors in-depth, examining national and world population trends, changing nutritional standards, projected world food production, anticipated export demands for United States food, and possible farmland conversion scenarios in the United States. *See id.* at 522-41. After an in-depth analysis of these factors, Church states that "[t]he untidy truth is simply that no one can be sure whether a farmland preservation problem will arise or not." *Id.* at 541.

<sup>52</sup> *Id.* at 542.

<sup>53</sup> *Id.* at 543.

<sup>54</sup> See Tweeten, *supra* note 3, at 240-50. Professor Tweeten's article analyzes a number of factors that impact food security projections for the future, including the magnitude and sources of farmland losses, historic global yield trends for five major crops, and future demand for food based on population and global income projections. From a rather sophisticated analysis he concludes that "the future global food supply and demand balance" will be tighter than what we have experienced since World War II. *Id.* at 247. He notes, however, that this will primarily threaten poor nations, and does not suggest food shortages in the United States. He indicates that food prices will rise in this country, but since food prices are only a small portion of our income in this country, it will not have a major impact on most people, though possibly some effect on low-income people. *See id.* at 247-48. It will potentially have a major effect globally, however, and Professor Tweeten suggests the need for national and international responses at this time. *See id.* at 248-49.

on future generations. Moreover, our ability to respond in a humanitarian fashion to food crises elsewhere might be compromised, bringing a moral dimension to the debate.<sup>55</sup>

Needless to say, the food security issue is neither clearcut nor singularly compelling at this point. Although the long-range future is always hard to predict, any food security concerns are very uncertain at best.<sup>56</sup> Nonetheless, there are certainly some attenuated long-term food issues for farmland preservation, and it continues to be a stated rationale for regulatory efforts.<sup>57</sup> Moreover, the irreversible nature of farmland conversion, together with potential time lags for appropriate market responses, suggest it is prudent to err on the side of caution in this area.<sup>58</sup>

The second general type of rationale behind farmland preservation concerns a variety of what might loosely be termed as "environmental benefits" from farmland preservation. As noted by the AFT study and various commentators, farmland provides a number of benefits for society, including groundwater recharge, control of stormwater runoff, wildlife habitat, and open-space preservation.<sup>59</sup> Moreover, preservation of prime farmland avoids environmental costs often associated with shifting rangeland and forestland to the cropland base. This might include increased erosion rates, loss of forests, and increased water usage.<sup>60</sup>

Particularly important to some are the aesthetic and open space benefits provided by farmland preservation. The open space provided by farmland near

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<sup>55</sup> The NALS study suggested this as one additional concern in evaluating our ability to respond to future international food needs, noting in particular that future increases in food production costs might make solutions to international food shortages more difficult. *See* NALS, *supra* note 3, at 61–62; *see also* MALONE, *supra* note 27, § 6.03 (noting the argument that farmland preservation is necessary to maintain adequate worldwide food supplies in future).

<sup>56</sup> *See, e.g.*, Church, *supra* note 5, at 541–43.

<sup>57</sup> *See, e.g.*, Farmland Protection Act, 7 U.S.C. § 4201(a) (1994); Illinois Farmland Preservation Act, 505 Ill. Comp. Stat. 75/2 (West 1993 & Supp. 1999).

<sup>58</sup> Larry Libby makes this point well, noting that the "food security" issue is really about "risk management over time." Libby, *supra* note 3, at 427. He recognizes there is substantial uncertainty regarding our future ability to meet food needs, but that most current projections are "sanguine" about our food production capacity until about 2050. *See id.* He notes that this is based on several assumptions, including retention of some of the "most highly productive land in farms[,] continued management and technological advances, and the ability to convert other lands (such as pasture and range) to productive farmland. *Id.* However, from a risk management perspective, he concludes that the consequences of preserving more farmland than needed are less severe than the consequences of not preserving enough. *See id.* at 427–28; *see also* Church, *supra* note 5, at 543 ("[a]lthough a serious problem may never materialize, the possibility of a problem justifies at least some present concern").

<sup>59</sup> *See* SORENSEN ET AL., *supra* note 1, at 19–20; *see also* Libby, *supra* note 3, at 429; Tweeten, *supra* note 3, at 237–38.

<sup>60</sup> *See* SORENSEN ET AL., *supra* note 1, at 19.

residential development provides aesthetic relief from the intense development that surrounds residents, and often serves as a buffer between development and other sensitive land uses.<sup>61</sup> Preservation of farmland in proximity to development can also be an important reminder of our nation's heritage.

Finally, farmland preservation can also be seen as an important growth control measure helping to counter the effects of suburban sprawl. By preserving high quality farmland near the urban fringe, it necessarily limits the more scattered type of development that characterizes suburban sprawl. Not only does such sprawl threaten prime farmland, but it also imposes substantial infrastructure costs.<sup>62</sup> Scatter development also creates lengthier response time in terms of fire and police protection, and greater financial costs to serve such areas.<sup>63</sup> Thus, a benefit of farmland preservation is to facilitate growth management and decrease various societal costs associated with scatter development.

Proponents of farmland preservation do not suggest that the above rationales justify stopping all conversion. Most recognize that some conversion is inevitable and necessary to address other societal needs, most notably housing.<sup>64</sup> Ideally, conversion would occur when farmland is better suited for alternative uses, and would not occur when the benefits of preservation outweigh those of conversion. The concern, however, is that our best farmland is being converted at too fast a rate and broader societal concerns are not being adequately considered.

It might be argued, of course, that the market itself is the best avenue to allocate land uses and that the current conversion rate simply reflects societal preferences for land in its alternative, nonagricultural use.<sup>65</sup> The problem is that the market fails to consider all the costs and benefits in the transaction—they are external to the decisionmaking process. Thus, even if society is clearly better off in some instances by preserving farmland rather than converting it to alternative, nonagricultural uses, most of the benefits from preservation go to the broader public and not to the immediate parties involved. From the perspective of the

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<sup>61</sup> See *id.* at 20; Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 594–95 (1997).

<sup>62</sup> See SORENSEN ET AL., *supra* note 1, at 20.

<sup>63</sup> A recent study prepared for the Center for Agriculture in the Environment, a branch of the American Farmland Trust, found that large lot, scatter development—the type most frequently threatening to prime farmland—imposed increased financial costs for infrastructure and also caused significant response time for police and fire protection. See J. Dixon Esseks, et al., *Fiscal Costs and Public Safety Risks of Low-Density Residential Development on Farmland: Findings from Three Diverse Locations on the Urban Fringe of the Chicago Metropolitan Area* (last modified Jan. 1999) <<http://farm.fic.niu.edu/cae/wp/98-1/wp98-1.html>>.

<sup>64</sup> See, e.g., Church, *supra* note 5, at 553.

<sup>65</sup> Similarly, the argument has been made that even if a farmland conversion problem arises, the market, through its pricing mechanisms, will itself move to protect farmland without the need for government intervention. See Delogu, *supra* note 3, at 523–33.

landowner considering an attractive offer to sell, the immediate benefits from conversion are almost always greater. It is this concern that legitimizes government intervention to control conversion, at least in some instances. The next section of this Article briefly overviews some of the basic farmland preservation techniques that have been used.

### *C. Farmland Preservation Techniques*

In response to the growing perception that farmland conversion is a significant societal problem, and given additional impetus by the 1981 NALS study, state and local governments have adopted a variety of techniques to encourage the preservation of farmland. The NALS study identified several basic types of programs which continue to form the basis for local and state preservation efforts today.<sup>66</sup> This Article does not give a comprehensive discussion of these programs, which has been done elsewhere,<sup>67</sup> but instead briefly summarizes the most common alternatives.

One of the earliest and most common techniques for farmland preservation is state programs providing various types of tax-relief to owners of agricultural land.<sup>68</sup> Today all fifty states have some form of tax relief provisions for agricultural land.<sup>69</sup> The most common of these are preferential-assessment statutes, which assess land at a reduced value when used for agriculture<sup>70</sup> and deferred taxation programs,<sup>71</sup> which provide lower assessment for farmland but

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<sup>66</sup> See NALS, *supra* note 3, at 63–75.

<sup>67</sup> See generally, e.g., Church, *supra* note 5; Robert E. Coughlin & John C. Keene, *The Protection of Farmland: An Analysis of Various State and Local Approaches*, 33 LAND USE L. & ZONING DIGEST, 5 (1981); Juergensmeyer, *supra* note 8; Teri E. Pope, *A Survey of Governmental Response to the Farmland Crisis: States' Application of Agricultural Zoning*, 11 U. ARK. LITTLE ROCK L.J. 515 (1988–1989); Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591 (1984). For a recent examination of how several different strategies have been applied in concrete situations, see White, *supra* note 7.

<sup>68</sup> For a general discussion of differential tax programs for farmland, see generally Barry A. Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978); Juergensmeyer, *supra* note 8, at 466–70.

<sup>69</sup> See American Farmland Trust, *State Farmland Protection Statutes by Category (Table)* (visited Oct. 30, 1999) <<http://farm.fic.niu.edu/fic/laws/fpkeytab.html>> (categorizing all 50 state statutes).

<sup>70</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 42-12004, 42-15004 (West 1999); COLO. REV. STAT. ANN. §§ 39-1-102 to 103 (1998); GA. CODE ANN. §§ 48-5-7 to 7.5 (1999); IOWA CODE ANN. § 441.21 (West 1998 & Supp. 1999); MINN. STAT. ANN. § 273.111 (West 1999); N.D. CENT. CODE §§ 57-02-27 to 27.2 (1983 & Supp. 1997); W. VA. CODE § 11-1A-10 (1995 & Supp. 1999).

<sup>71</sup> See, e.g., ALA. CODE §§ 40-7-25 to 25.3 (1993 & Supp. 1998); 35 ILL. COMP. STAT. ANN. 200/10-110 to 147 (West 1996 & Supp. 1999); NEB. REV. STAT. §§ 77-1343 to 1363 (1996 & Supp. 1998); N.J. STAT. ANN. §§ 54:4-23.1 to 23.21 (West 1986 & Supp. 1999);

require partial or total repayment of tax savings if the land is later converted to other uses. The obvious purpose of both types of legislation is to provide financial incentives for farmers to offset the financial pressures posed by conversion.

A second type of farmland preservation program, also found in all fifty states, are right-to-farm laws.<sup>72</sup> These statutes provide farmers protection against certain nuisance actions, typically in "coming to the nuisance" situations, where development has moved out to agricultural areas and created conflicting uses.<sup>73</sup> Slightly less than half the states also provide protection against local government efforts to zone out existing agricultural uses, again typically in "coming to the nuisance" scenarios.<sup>74</sup> They do not permit expansion of existing uses, but provide protection for the level of agricultural activity in existence when development arrived. These right-to-farm statutes do not guarantee preservation, but provide protection to farmers who desire to continue farming in the face of approaching development.

A third and less common type of preservation program is agricultural

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OHIO REV. CODE ANN. § 5713.34 (Anderson 1999); S.C. CODE ANN. §§ 12-43-220 to 232 (Law. Co-op. 1977 & Supp. 1998).

<sup>72</sup> For a general discussion of right-to-farm laws, see generally Keith Burgess-Jackson, *The Ethics and Economics of Right-To-Farm Statutes*, 9 HARV. J.L. & PUB. POL'Y 481 (1986); Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1984); Edward Thompson, Jr., *Right-To-Farm Laws*, in 1983 ZONING AND PL. L. HANDBOOK 207 (Fredric A. Strom, ed.). For recent criticisms of right-to-farm laws, see generally Neil D. Hamilton, *Right-to-farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. OF AGRIC. L. 103 (1998); Alexander A. Reinert, Note, *The Right-To-Farm: Hog-Tied and Nuisance Bound*, 73 N.Y.U. L. REV. 1694 (1998).

<sup>73</sup> See, e.g., ALA. CODE § 6-5-127 (1993 & Supp. 1998); ARIZ. REV. STAT. ANN. §§ 3-111 to 112 (West 1995 & Supp. 1998); GA. CODE ANN. § 41-1-7 (1997 & Supp. 1999); 740 ILL. COMP. STAT. ANN. 70/1 to 5 (West 1993 & Supp. 1999); IND. CODE ANN. § 34-1-52-4 (West 1983 & Supp. 1998); MO. ANN. STAT. § 537.295 (West 1998 & Supp. 1999); W. VA. CODE §§ 19-19-1 to 5 (1997 & Supp. 1999). Judicial interpretation of right-to-farm laws has been limited, although in a few cases courts have found them to be applicable and to bar nuisance actions. See generally *Laux v. Chopin Land Associates*, 550 N.E.2d 100 (Ind. Ct. App. 1990) (discussing what constitutes "changed conditions" for nuisance actions); *Steffens v. Keeler*, 503 N.W.2d 675, 677-78 (Mich. Ct. App. 1993) (per curiam) (barring a nuisance claim because evidence did not show the change of agricultural area to a residential area). In a recent case, however, *Bormann v. Board of Supervisors for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), the Iowa Supreme Court held that the nuisance immunity provision found in Iowa's agricultural land preservation statute constituted a taking of neighbors' property rights and was therefore unconstitutional. See *id.* at 321.

<sup>74</sup> See, e.g., CAL. CIV. CODE §§ 3482.5 to .6 (West 1997 & Supp. 1999); COLO. REV. STAT. §§ 35-3.5-101 to 103 (1998); N.D. CENT. CODE §§ 42-04-01 to 05 (1983 & Supp. 1999); OHIO REV. CODE ANN. § 3767.13 (Anderson 1997 & Supp. 1998); 3 PA. CONS. STAT. ANN. §§ 951-957 (West 1995 & Supp. 1999); S.C. CODE ANN. §§ 46-45-10 to 60 (Law. Co-op. 1987 & Supp. 1998); TEX. AGRIC. CODE ANN. §§ 251.001-251.006 (West 1982 & Supp. 1999); WIS. STAT. ANN. § 823.08 (West 1994 & Supp. 1998).

districting.<sup>75</sup> Currently recognized in approximately fifteen states,<sup>76</sup> agricultural districting involves the voluntary creation of special agricultural districts, which require that the land be used for agricultural purposes. Districts are established for a limited period of time, such as five to ten years, which can then be renewed. In exchange for the requirement that the land stay agricultural, landowners receive a number of benefits, depending on the particular authorizing statute. Some are similar to benefits conferred by other statutes, such as differential tax assessments and right-to-farm provisions. Others are more unique to the district, and might include PDR provisions, limitations on the exercise of eminent domain against farm property, and restrictions on special assessments and government annexations.<sup>77</sup>

As noted by various commentators, the voluntary nature of all of the above programs significantly limit their effectiveness.<sup>78</sup> Right-to-farm laws are only effective in preventing involuntary conversion against a landowner's wishes; they provide little basis to preserve farmland when a farmer desires to convert. Although tax incentives and agricultural districting can both provide some temporary relief from conversion pressures, neither is sufficient to offset the financial incentive of conversion when significant development pressure exists.<sup>79</sup> Indeed, in some instances they simply help subsidize farmland while waiting for development. Such programs play an important role in a comprehensive preservation program, but by themselves will often be ineffective in establishing long-term farmland preservation.

For that reason, effective farmland preservation programs will need to restrict a landowner's ability to convert by relying on techniques that place decisionmaking authority elsewhere, most notably the government. The most common and least expensive way this can be done is by some type of public restriction placed on the land, typically in the form of agricultural zoning. Fourteen states currently have statutes which specifically address and authorize

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<sup>75</sup> For discussions of agricultural districting, see MALONE, *supra* note 27, at § 6.09; Coughlin & Keene, *supra* note 67, at 6-7; White, *supra* note 7, at 124-135.

<sup>76</sup> See, e.g., DEL. CODE ANN. tit. 3 §§ 901-930 (1993 & Supp. 1998); 505 ILL. COMP. STAT. ANN. 5/1 to 20.3 (West 1993 & Supp. 1999); IOWA CODE ANN. § 352.1 to 352.12 (West 1994 & Supp. 1999); KY. REV. STAT. ANN. § 262.850 (Michie 1994 & Supp. 1998); MD. CODE ANN., AGRIC. §§ 2-501 to 516 (1999); MASS. GEN. LAWS ANN. ch. 132A, § 11A (Law. Co-op. 1989 & Lexis Supp. 1999); MINN. STAT. ANN. §§ 473 H.01-473 H.18 (West 1994 & Supp. 1999); N.J. STAT. ANN. §§ 4:1C-1 to 55 (West 1998 & Supp. 1999); OHIO REV. CODE ANN. §§ 929.01 to .05 (Anderson 1988 & Supp. 1999); 3 PA. CONS. STAT. ANN. §§ 901-915 (West 1995 & Supp. 1999); TENN. CODE ANN. §§ 43-34-101 to 108 (Supp. 1998); UTAH CODE ANN. §§ 17-41-101 to 406 (1995 & Supp. 1999).

<sup>77</sup> See MALONE, *supra* note 27, at § 6.09[1]; REDFIELD, *supra* note 5, at 103.

<sup>78</sup> See, e.g., Church, *supra* note 5, at 547-51; Wadley, *supra* note 5, at 493.

<sup>79</sup> See REDFIELD, *supra* note 5, at 96-97; Church, *supra* note 5, at 550-51; Juergensmeyer, *supra* note 8, at 466-67.

particular forms of "agricultural protection zoning,"<sup>80</sup> but as a practical matter agricultural zoning clearly falls within local government's general zoning power, even in the absence of a special statute. Because it can preclude conversion of farmland even when significant financial incentives exist, zoning is a widely and increasingly used farmland preservation technique at the local government level.

Agricultural zoning can take several basic forms.<sup>81</sup> On the one hand, local governments can impose what is often referred to as "exclusive agricultural zoning,"<sup>82</sup> which prohibits any use other than agricultural. Even this type of zoning will permit certain compatible or accessory buildings, such as barns, on the property; fundamentally, however, exclusive agricultural zoning is designed to limit the property to agricultural use only.

A more common approach to agricultural zoning is to permit non-farm uses, most notably residential, but in effect to establish agricultural restrictions through severe density limitations. This is often done through large minimum-lot size requirements, where the minimum lot size typically corresponds to "the minimum size of commercial farms . . . in the area."<sup>83</sup> Thus, minimum lot sizes might range from one house per 40 acres to one house per 160 acres. The obvious effect is to limit the property to agricultural use. Agricultural zoning might also impose density restrictions but permit small lot "clustering" of actual development on the property.<sup>84</sup> This permits a greater overall density level, such as one dwelling per ten acres, but leaves a significant area of land to be completely free for farming.

Whatever its form, agricultural zoning serves the purpose of significantly limiting development on farmland property, thus preserving the property's farmland status. Importantly, by placing public restrictions on the property the landowner is not free to sell the land for nonagricultural use when development pressure and attendant financial incentives become great. The result is to place the cost of preservation as reflected in diminution in land value on the restricted landowner.

In contrast, two other preservation techniques, Purchase of Development Rights programs and Transferrable Development Rights programs, limit a landowner's ability to convert, but do so by shifting the cost of preservation to the

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<sup>80</sup> See, e.g., ARIZ. REV. STAT. ANN. § 9-462.01 (West 1996 & Supp. 1998); IND. CODE ANN. § 36-7-4-601 (West 1997 & Supp. 1998); KY. REV. STAT. ANN. § 100.187 (Michie 1993 & Supp. 1998); MINN. STAT. ANN. § 394.25 (West 1997 & Supp. 1999); NEB. REV. STAT. §§ 19-903 to 916 (1997); OR. REV. STAT. § 215.203 (1991 & Supp. 1998); 53 PA. CONS. STAT. ANN. §§ 10601-10608 (West 1997 & Supp. 1999); VT. STAT. ANN. tit. 24, §§ 4301-4496 (1992 & Supp. 1998).

<sup>81</sup> For discussion of the variations in agricultural zoning, see MALONE, *supra* note 27, § 6.08 (discussing different forms that agricultural zoning can take); Juergensmeyer, *supra* note 8, at 451-55 (same).

<sup>82</sup> See MALONE, *supra* note 27, § 6.08[3].

<sup>83</sup> *Id.* § 6.08[2][a].

<sup>84</sup> See *id.* § 6.08[2][b].



public. In a PDR program, the government typically will buy the development rights on farmland, paying the landowner the difference between the property's value if more intensive development is allowed and its value if limited to agricultural use.<sup>85</sup> The property can no longer be converted to more intense, nonagricultural use, since the development rights have been transferred elsewhere, yet the cost of preservation is borne by the public through the purchase agreement.<sup>86</sup>

Like PDR programs, TDR programs give restricted property owners compensation for loss of development rights, but instead of cash landowners are given development rights that can be transferred elsewhere.<sup>87</sup> The transferred rights can be used to exceed applicable restrictions in identified "receiving areas," thus providing a benefit to the landowner. In effect, the TDRs involve a shifting of potential development from one area to another, with the result that farmland is preserved. Moreover, most TDR programs permit the TDRs to be sold to other landowners with eligible property, providing a source of income to the restricted property owners. Although TDRs might function in a voluntary setting, they more typically are provided in conjunction with mandatory zoning schemes to offset the burden of preservation.<sup>88</sup>

PDR and TDR programs are attractive in that they shift the cost to the public,

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<sup>85</sup> For discussions of the use of conservation easements and PDR programs to preserve farmland, see generally MALONE, *supra* note 27, at § 6.11; Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 ANN. SURV. AM. L. 235.

<sup>86</sup> A number of states have statutes specifically authorizing PDR programs. See, e.g., ARIZ. REV. STAT. ANN. §§ 9-464.01 (West 1996 & Supp. 1998), 11-935.01 (West 1990 & Supp. 1998); CAL. PUB. REV. CODE §§ 10200 to 10277 (West 1996 & Supp. 1999); CONN. GEN. STAT. ANN. §§ 22-26aa to 26jj (West 1985 & Supp. 1999); DEL. CODE ANN. tit. 3 §§ 901 to 930 (1993 & Supp. 1998); KY. REV. STAT. ANN. §§ 262.900 to 920 (Michie 1994 & Supp. 1998); ME. REV. STAT. ANN. tit. 5, §§ 6200-6210 (West 1989 & Supp. 1998); N.H. REV. STAT. ANN. §§ 432:18 to 432:31a (1991 & Supp. 1998); N.J. STAT. ANN. §§ 4:1C-1 to 55 (West 1998 & Supp. 1999); 3 PA. CONS. STAT. ANN. §§ 901 to 915 (West 1995 & Supp. 1999); VT. STAT. ANN. tit. 24, §§ 4301 to 4495 (1992 & Supp. 1998); WASH. REV. CODE ANN. §§ 84.34.010 to .925 (West 1991 & Supp. 1999); W. VA. CODE §§ 8-24-72 to 78 (1998 & Supp. 1999).

<sup>87</sup> The literature on TDRs is voluminous. See generally John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Julian Conrad Juergensmeyer, et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW 441 (1998); Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867 (1984). Several states have passed statutes specifically authorizing TDR programs. See, e.g., FLA. STAT. ANN. § 163.3202 (West 1990 & Supp. 1999); KY. REV. STAT. ANN. § 100.208 (Michie 1993 & Supp. 1998); N.J. STAT. ANN. §§ 4:1C-1 to 55 (West 1998 & Supp. 1999); N.Y. GEN. CITY LAW § 20-f (McKinney Supp. 1999); TENN. CODE ANN. § 13-7-101 (1992 & Supp. 1998); VT. STAT. ANN. tit. 24, §§ 4301-4496 (1992 & Supp. 1998).

<sup>88</sup> See White, *supra* note 7, at 135-40 (describing TDR programs for farmland preservation).

thus arguably appearing more fair.<sup>89</sup> Moreover, both programs are possibly less susceptible to the shifting political climate often affecting zoning, where deviation from initial zoning designation often and easily occurs in the face of development pressure. Yet the cost of PDR programs make them unrealistic for widespread use, especially in a time of fiscal restraint for most local governments. TDR programs avoid this problem by providing development rights instead of money, but are contingent upon the right mix of ingredients, including appropriate "receiving areas" to succeed. In particular, there must be significant enough land-use restrictions in place to make the TDRs worth something, along with conditions suitable to absorb the transferred development.<sup>90</sup> Further, TDR programs require the stability of zoning restrictions so that the value of TDRs are not undermined—a relatively rare occurrence.<sup>91</sup> For these reasons, few successful TDR programs have emerged and their promise as a farmland preservation tool is limited.<sup>92</sup>

Although TDR and in particular PDR programs certainly have a role to play in comprehensive farmland preservation programs, their potential is limited. For this reason, any comprehensive effort must rely on agricultural zoning or other forms of public land use restrictions. This is best done through a comprehensive planning process, in which the need to preserve farmland can be appropriately viewed in the context of other, and at times, competing societal needs, including affordable housing. The end result, however, will necessarily be restrictions on some owners' rights to convert to more intensive development, often at a significant financial cost to the affected landowner.

Despite the central role that zoning must play in farmland preservation, it is subject to two common and closely related challenges. The first of these is that the imposition of zoning restrictions to preserve farmland constitutes an unconstitutional taking of property, especially when it results in significant diminution in value to the affected landowner. Second, even if not a taking, a growing number of property owners perceive such restrictions as unfair where the cost of preservation is placed on landowners instead of the public as a whole. The next two sections of this Article will address each of these arguments in turn.

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<sup>89</sup> See, e.g., Coughlin & Keene, *supra* note 67, at 9 (suggesting in some situations PDRs more fair than agricultural zoning); Juergensmeyer et al., *supra* note 87, at 444 (suggesting TDR programs more fair than zoning in some cases); Lazarus, *supra* note 12, at 731–32 (suggesting TDR programs are a way to address the legitimate fairness issues that sometimes arise).

<sup>90</sup> See Juergensmeyer et al., *supra* note 87, at 446–48 (describing how TDR system works); Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 574–79 (1992) (discussing difficulties in establishing successful TDR program)

<sup>91</sup> See Juergensmeyer et al., *supra* note 87, at 447–48; Kayden, *supra* note 90, at 578.

<sup>92</sup> See Kayden, *supra* note 90, at 576–77 (discussing limited success of TDR programs).

## III. TAKINGS AND AGRICULTURAL ZONING

As noted above, an initial issue with public controls on farmland, and in particular agricultural zoning, is whether they constitute an unconstitutional taking of property. This is a frequent argument made by owners of agricultural land when they are forced to forego substantial appreciated value that conversion to a nonagricultural use would bring. They perceive the often substantial diminution in value as compared to alternative uses as a taking of property, both because of the lost economic value and the interference with perceived property rights. This part of the Article first analyzes such takings claims under current United States Supreme Court doctrine and then reviews how lower courts have addressed the issue.<sup>93</sup>

A. *Supreme Court Takings Doctrine*

The Supreme Court's takings analysis has gone through a long, and at times, tortuous path and still remains far from clear.<sup>94</sup> The Court first recognized the concept of a regulatory taking in its seminal decision in *Pennsylvania Coal Co. v. Mahon*,<sup>95</sup> in which it struck down a state statute that had the effect of requiring coal companies to keep a portion of coal in the ground to avoid subsidence damage to surface structures.<sup>96</sup> Although the Court acknowledged that government could not go on if it had to pay every time its regulations reduced the value of land, it stated that "if a regulation goes too far it will be recognized as a taking."<sup>97</sup> The Court concluded that the statute had "gone too far" and constituted a taking, but failed to explain its conclusion other than to state that the statute

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<sup>93</sup> For other discussions of whether agricultural zoning constitutes a taking, see REDFIELD, *supra* note 5, at 20-44; Sam Sheronick, Note, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583, 598-604 (1991).

<sup>94</sup> Commentators have frequently noted the less than clear state of Supreme Court takings jurisprudence. See, e.g., ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 514 (2d ed. 1993) (stating a lack of consistent standards has led to confusion); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 102 (1995) (describing the jurisprudence as "an unworkable muddle"); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 *URB. LAW.* 307, 308 (1998) ("[i]ncoherence . . . has by now been demonstrated time and again . . ."); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 *WASH. L. REV.* 91, 92 (1995) ("Regulatory takings are proving to be one of the enduring dilemmas of the twentieth century.").

<sup>95</sup> 260 U.S. 393 (1922).

<sup>96</sup> See *id.* at 412-13, 416.

<sup>97</sup> *Id.* at 415.

made the mining of anthracite coal "commercially impracticable."<sup>98</sup>

Although the precise holding of *Pennsylvania Coal* is subject to some debate, it clearly established that the mere regulation of property for otherwise legitimate purposes might constitute a taking if the economic impact is too severe.<sup>99</sup> The Court gave little guidance, however, as to when that point is reached. It suggested that diminution in value might be a factor, but failed to clarify how that is determined other than stating when diminution reaches a "certain magnitude" a taking occurs.<sup>100</sup> Despite this language, in the years subsequent to *Pennsylvania Coal* the Court has consistently rejected takings challenges on the basis of economic impact alone. Indeed, after *Pennsylvania Coal* the Court never found a taking based solely upon economic impact until its recent decision in *Lucas v. South Carolina Coastal Council*,<sup>101</sup> which involved a rather extreme fact situation. Rather, the Court has often upheld restrictions on land-use restrictions despite substantial diminution in value.<sup>102</sup>

The leading case typifying the Court's takings jurisprudence during this period was *Penn Central Transportation Co. v. New York City*,<sup>103</sup> where it upheld the validity of New York City's Landmark Preservation Law against a takings challenge. In that case, New York City, pursuant to its Landmark Preservation Law, had designated Grand Central Terminal, owned by Penn Central, as a "landmark."<sup>104</sup> This meant that a Landmark Preservation Commission ("Commission") had to approve any exterior changes to the building, even if they were consistent with applicable zoning regulations.<sup>105</sup> Penn Central sought approval of two alternative plans to build either a fifty-three story or fifty-five story addition to the building, both of which met current zoning requirements.<sup>106</sup> The Commission rejected both plans on grounds that they would aesthetically denigrate the landmark,<sup>107</sup> in effect eliminating or greatly reducing the previously existing and quite valuable air rights that Penn Central had. Penn Central then challenged the application of the law as a taking.<sup>108</sup>

In analyzing the validity of the Landmark Preservation Law, the Supreme Court began by noting that there was no clear formula for a takings analysis, but it

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<sup>98</sup> *Id.* at 414.

<sup>99</sup> *See* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127-28 (1978).

<sup>100</sup> *See Pennsylvania Coal*, 260 U.S. at 413.

<sup>101</sup> 505 U.S. 1003 (1992).

<sup>102</sup> *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% diminution in value).

<sup>103</sup> 438 U.S. 104 (1977).

<sup>104</sup> *See id.* at 115-16.

<sup>105</sup> *See id.* at 112.

<sup>106</sup> *See id.* at 116-17.

<sup>107</sup> *See id.* at 117-18.

<sup>108</sup> *See id.* at 119.

instead addressed takings claims on an ad hoc basis.<sup>109</sup> It then identified several factors to determine whether a taking occurred, including the nature of the government action, the diminution in value, and most importantly, the degree of interference with investment-backed expectations.<sup>110</sup> On that basis, the Court held that the Landmark Preservation Law did not constitute a taking as applied to Penn Central's property, emphasizing that the regulation still permitted a "reasonable return" on the land.<sup>111</sup>

Particularly significant to the Court in determining that the interference with Penn Central's investment expectations did not constitute a taking was that the Landmark Preservation Law did not prevent Penn Central from using the property for its original purpose as purchased. Grand Central had been used for the previous 65% as a railroad terminal containing office space and concessions.<sup>112</sup> For that reason the Landmark Preservation Law did not "interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."<sup>113</sup> Thus, even though the Landmark Preservation Law in effect eliminated more intensive development previously permitted by its zoning, the assurance of a reasonable return and continuation of previous uses that formed earlier expectations negated any takings concerns.

The Court's most recent articulation of its takings analysis based on economic impact comes from *Lucas v. South Carolina Coastal Council*,<sup>114</sup> a 1992 decision which builds upon the earlier *Pennsylvania Coal* and *Penn Central* decisions. In *Lucas*, the plaintiff, David Lucas, owned two undeveloped beach-front lots which permitted residential development at the time he purchased the property for \$975,000.<sup>115</sup> Subsequently a coastal preservation law was passed which had the effect of prohibiting any development on the property.<sup>116</sup> Lucas challenged the restriction as a taking.<sup>117</sup> The trial court found that the restriction rendered the property "valueless" and therefore constituted a taking.<sup>118</sup> The South Carolina Supreme Court reversed, reasoning that even if the regulation left the property valueless, it was not a taking because of the important public interests

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<sup>109</sup> See *id.* at 124.

<sup>110</sup> See *id.*

<sup>111</sup> *Id.* at 136.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> 505 U.S. 1003 (1992). Two years after *Lucas* the Court decided another important takings case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994). That decision did not focus on whether economic impact constituted a taking, however, but instead on the standard for reviewing exactions imposed as part of the development process, a type of taking derivative of the physical invasion line of cases. See *id.* at 385.

<sup>115</sup> See *Lucas*, 505 U.S. at 1007.

<sup>116</sup> See *id.* at 1006-07.

<sup>117</sup> See *id.* at 1009.

<sup>118</sup> See *id.*

served.<sup>119</sup>

The United States Supreme Court began its analysis by noting that although most takings inquiries are fact specific and ad hoc in nature, it had recognized two types of categorical takings in its previous cases.<sup>120</sup> In such instances, certain supporting facts establish a taking without a need to balance the respective interests involved.<sup>121</sup> First are physical invasions, in which the government invades or grants the right to other parties to intrude physically upon the property in question.<sup>122</sup> In such situations a taking is near automatic, no matter what the economic impact of the government action.<sup>123</sup>

The second type of categorical taking is "where the regulation denies all economically beneficial or productive use of the land."<sup>124</sup> The Court noted that it had recognized in a number of prior decisions that a taking occurs when a regulation "denies an owner economically viable use of his land."<sup>125</sup> In justifying this categorical taking, the Court noted that "in the extraordinary circumstance" when land has lost all economic viability "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'"<sup>126</sup> The Court did state that the loss of all economic viability would not constitute a taking where the regulation is merely prohibiting a common law nuisance, since such land use was not part of the landowner's property interest.<sup>127</sup>

In recognizing that the loss of economic viability constituted a categorical taking, the Court was careful not to preclude the possibility of finding a taking

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<sup>119</sup> *Id.* at 1009–10.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 1015

<sup>122</sup> *See id.*

<sup>123</sup> *See id.* The Court had previously recognized physical invasions, even when minimal in nature, as near per se takings. *See generally* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring landlords to permit cable companies to run cable wires on property); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (illustrating navigation servitude imposed on private marina); *United States v. Causby*, 328 U.S. 256 (1946) (discussing a law dealing with overhead flights).

<sup>124</sup> *Lucas*, 505 U.S. at 1015–16.

<sup>125</sup> *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)) (alteration in original) (citations omitted). The Court in *Agins* had used the "economically viable" standard as part of a two-part test for takings, stating that a regulation will be a taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 260 (citing *Penn Central Transp. Co.*, 438 U.S. 104, 138 n.36 (1977)) (citations omitted). The Court used that same articulation of the takings standard in a series of decisions in the 1980s. *See, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n.*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 295–96 (1981).

<sup>126</sup> *Lucas*, 505 U.S. at 1017–18 (quoting *Penn Central*, 438 U.S. at 124).

<sup>127</sup> *See id.* at 1027–31.

when a restriction reduces but does not altogether eliminate economic viability. In a footnote, the Court noted that such a restriction might still constitute a taking under the Court's ad hoc balancing test established in *Penn Central*.<sup>128</sup> It did not clearly define how such a test might operate, but did state that "'the economic impact of the regulation on the claimant and . . . the extent to which the regulation interfered with distinct investment-backed expectations' are keenly relevant"<sup>129</sup> to its general takings analysis.

Thus, in *Lucas* the Court established what might be viewed as a two-fold test for analyzing whether the economic impact of a regulation constitutes a taking. First, if the regulation leaves the property owner with no economic viability it is a categorical taking, absent a finding that the prohibited use would have constituted a common law nuisance. Second, even if some economic viability remains, a court is to examine the economic impact and interference with investment-backed expectations to determine if a taking is to be found. However, such analysis must be made in the context of *Penn Central*, where the Court examined the ability of continued use, as opposed to potential use, and the established nature of the use.

The above analysis suggests that agricultural zoning would rarely constitute a taking under current Supreme Court standards, even where it results in substantial diminution in value. It is likely that farming will be viewed as an economically viable land use, precluding a finding of a categorical taking.<sup>130</sup> Although the Court has not clearly indicated how economic viability is determined,<sup>131</sup> the primary focus is not on what is lost in terms of potential profit, but what remains in terms of possible use.<sup>132</sup> As long as there is a reasonable ability to generate a livelihood, there is economic viability. This would normally be the case with farmland, where an agricultural zoning designation would typically permit continuation of current activities.

In this sense, farmland preservation can be distinguished from other types of environmental land-use controls, such as restrictions designed to preserve wetlands, coastal zones, and wildlife habitat. If such regulations are applied to the

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<sup>128</sup> See *id.* at 1019 n.8 (quoting *Penn Central*, 438 U.S. at 124).

<sup>129</sup> *Id.*

<sup>130</sup> Lower courts that have addressed the economic viability issue have consistently found agricultural use as economically viable. See, e.g., *Grand Land Co. v. Township of Bethlehem*, 483 A.2d 818, 820-21 (N.J. Super. Ct. App. Div. 1984); *City of Virginia Beach v. Virginia Land Investment Ass'n No. 1*, 389 S.E.2d 312, 314 (Va. 1990).

<sup>131</sup> See Oswald, *supra* note 94, at 117-26.

<sup>132</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) (stating categorical taking for no economic viability applies "in the extraordinary circumstance when no productive or economically beneficial use of land is permitted"); see also Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 175 (1995) (noting economic viability standard applies only when there are no productive uses of property remaining).

totality of a landowner's property,<sup>133</sup> they typically require that the property be left in its natural state, as was the case in *Lucas*. This not only precludes development, but greatly limits any realistic opportunities for economic use.<sup>134</sup> In contrast, agricultural zoning, though prohibiting development, permits continuation of what had been the intended economic use of the property.

For similar reasons, agricultural zoning would not usually constitute a taking under the *Penn Central* balancing test which focuses on interference with investment-backed expectations. This is clearest where an agricultural limitation has been in place prior to appreciated values and the affected landowner is now seeking an "upzoning" to a more intensive use. Although refusal to upzone in such a situation might result in significant loss of potential appreciated value for the landowner, this can hardly be viewed as a significant interference with investment-backed expectations. Even where the purchase price reflects the potential for intensive development, this is speculation on a possible zoning change and is certainly not the type of investment for which compensation should be required.<sup>135</sup>

The issue is somewhat more problematic when property is "downzoned" from more intensive use to agricultural, resulting in a substantial diminution in value. Two different scenarios should be distinguished here. First, is where the original investment in the property clearly reflects agricultural use and value, and only later did the value greatly appreciate, probably due to subsequent development in the vicinity of the regulated property. This might likely be where, no matter what the original zoning designation at the time of purchase, the property was economically best suited for agricultural use with no significant development pressure. Subsequent to that purchase, the land gradually came under development pressure, raising the value substantially.

Despite the substantial diminution in value such a scenario might cause, a

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<sup>133</sup> A critical issue in takings analysis is how the property being regulated is defined, often known as the "denominator" issue. See Blumm, *supra* note 132, at 184; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967). Although the Court in *Lucas* suggested there are still questions regarding how the property is defined, see *Lucas*, 505 U.S. at 1016-17 n.7, the Court in other contexts has made clear that the relevant property is the parcel as a whole and not just the segment being regulated. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-99 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978). Thus, if only half of the property is subject to an environmental restriction precluding development, the economic impact should be assessed according to the economic viability of the entire parcel. For this reason, significant takings concerns should arise only if environmental restrictions apply to most or all of the property.

<sup>134</sup> The Court in *Lucas* suggested that leaving property in its natural state was perhaps the only clear instance in which property would be left with "no economic viability." *Lucas*, 505 U.S. at 1018.

<sup>135</sup> See John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 366-67 (1989); Oswald, *supra* note 94, at 115-16.



substantial interference with investment-backed expectations so as to constitute a taking is unlikely. As in *Penn Central*, the original investment reflects the permitted agricultural use; the downzoning only interferes with opportunities subsequent to the investment. The lost appreciated value does not so much reflect the investment of the landowner as a fortuitous windfall from advancing development, much of it even created by government itself through provision of infrastructure.<sup>136</sup> Although downzoning in such a situation clearly has an economic impact on the affected landowner, it likely does not amount to the degree of interference with investment-backed expectations contemplated by *Penn Central*. Indeed, *Penn Central* itself essentially involved this same scenario, where what had been permitted development was eliminated, resulting in significant economic impact, but not interfering with what had been the original expectation of the property owner.<sup>137</sup>

More difficult is where property is purchased at a price reflecting permitted development opportunities, which is then downzoned resulting in substantial economic loss. In such situations, the landowner's development expectations are arguably backed by the purchase price, and the diminution in value resulting from downzoning is an interference so as to constitute a taking. Even here, however, it is not certain whether the degree of interference constitutes a taking for several reasons. To be implemented in the first place, zoning necessarily involves downzoning from previous development opportunities, which inevitably will affect some recently purchased property. Although never directly addressing the issue, the Court in upholding various zoning schemes, including that in *Penn Central*, has never suggested that an interference with purchase prices in this manner would be unconstitutional.<sup>138</sup> Indeed, the Court has never clearly identified an interference with investment-backed expectations that constitutes a taking,<sup>139</sup> while at the same time stating that diminution in value by itself does not

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<sup>136</sup> See *infra* notes 243–247 and accompanying text.

<sup>137</sup> See *Penn Central*, 438 U.S. at 136 (stating there was no interference with investment-backed expectations because property could be used as it had been for the previous 65 years).

<sup>138</sup> See *id.* (holding that New York City's Landmark Preservation Law was not a taking); cf. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (holding that zoning ordinance that limited development did not constitute a taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (denying the grant of an injunction to prevent the enforcement of a zoning ordinance).

<sup>139</sup> The Court has explicitly or implicitly considered the issue of interference with investment-backed expectations with regard to land-use regulations in several cases since *Penn Central*, without ever finding a taking on that basis. See *Agins*, 447 U.S. at 262–63 (1981); *Keystone Bituminous Coal Ass'n*, 480 U.S. 470, 493–97 (1987); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294–96 (1981). It has also occasionally analyzed the extent of interference with investment-backed expectations in regulatory contexts other than land, such as regulation of pension funds, in several cases saying the interference with expectations did not constitute a taking. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646–47 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226–28 (1986).

constitute a taking.<sup>140</sup>

Second, the Court and commentators have also recognized the notion of "regulatory risk," a concept that helps inform the reasonableness of any investment-backed expectations. The Supreme Court recognized this in *Lucas*, where it stated, "[i]t seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . ."<sup>141</sup> This builds on statements by the Court in other regulatory contexts, in which it has strongly affirmed the idea that the risk of regulation is part of economic life, which includes the distinct possibility of economic loss.<sup>142</sup> The Court has noted this is particularly true with regard to activities that "[have] long been the source of public concern and the subject of government regulation."<sup>143</sup> As noted by John Humbach, this certainly includes the land development field, which has long been subject to government regulation and, if anything, the trend is toward greater controls.<sup>144</sup>

Commentators have similarly recognized the concept of regulatory risk as playing an important role in takings analysis. As noted by Frank Michelman,

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In a case decided last term, however, *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998) a four person plurality of the Court found that a requirement under the Coal Act of 1992 that required a company to pay the health care costs of retired workers employed by the company before it stopped mining in 1965 was a taking under the *Penn Central* balancing test. See 118 S.Ct. 2131, 2131 (1998). In particular, the plurality found the Coal Act violated reasonable investment-backed expectations, both because the distance it reached into the past posed "substantial questions of fairness" and the nature of the government's past regulation at the time Eastern conducted business could not have given the company possible notice "that lifetime health benefits might be guaranteed to retirees several decades later." *Id.* at 2152. However, Justice Kennedy, the swing vote, expressly rejected that analysis, stating that the takings analysis was inapplicable to the regulation of pension assets. See *id.* at 2154-58. The four dissenting Justices similarly rejected the application of the takings analysis to the facts of the case. See *id.* at 2164-68. Thus, five of the Justices found the takings analysis inapplicable to the facts of the case. Moreover, it should be emphasized that even to the extent the plurality found an interference with investment-backed expectations under the takings clause, it was based on a very extreme fact pattern, in which a substantial regulatory burden was imposed on a company nearly three decades after it exited the industry, and the burden was of the type that could not have been reasonably anticipated at the time it conducted business.

<sup>140</sup> See *Penn Central*, 438 U.S. at 131.

<sup>141</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>142</sup> The Supreme Court has often stated that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); *Concrete Pipe*, 508 U.S. 602, 645 (1993) (quoting *Darlington*); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Darlington*); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (stating that one must accept regulatory burdens as part of doing business); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976).

<sup>143</sup> *Ruckelshaus*, 467 U.S. at 1007.

<sup>144</sup> See Humbach, *supra* note 135, at 367-68.

"regulation [is] an ordinary part of background risk and opportunity, against which we all take our chances . . . as investors in property."<sup>145</sup> This includes the risk that "government may tighten the applicable regulations,"<sup>146</sup> leading to a substantial loss in value from the purchase price. As a practical matter, purchase prices should also be discounted by the possibility of regulation. Thus, although often recognizing that the notion of investment-backed expectations is circular and extremely ambiguous, a number of commentators have argued persuasively that the risk of regulation, resulting in a possible diminution in value, is part of reasonable landowner expectations in property.<sup>147</sup>

This is not to say that all state interference with land investment can be easily dismissed on the basis that property owners should have foreseen that regulation might occur, which is clearly inconsistent with Supreme Court jurisprudence. The protection of land investment is most reasonably expected, however, when based on actual development expenditures rather than speculation on future uses.<sup>148</sup> Where a landowner has actually spent money developing land, there is a strong public policy that the landowner's expectations be protected, otherwise incentives for the development of land, critical to our well-being, are jeopardized.<sup>149</sup> But where the investment is merely the purchase of land for future development, expectations must be considered contingent at best. Although even here interference with expectations might constitute a taking, it would need to be in the context of compelling facts.

The above analysis suggests that in the majority of instances, reasonable efforts at agricultural zoning should not constitute a taking, even when resulting in

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<sup>145</sup> Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409, 415 (1995).

<sup>146</sup> Humbach, *supra* note 135, at 367.

<sup>147</sup> See Humbach, *supra* note 135, at 367; Daniel Mandelker, *Investments—Backed Expectations in Takings Law*, 27 URB. LAW. 215, 233–36 (1995); Michelman, *supra* note 145, at 415.

<sup>148</sup> See Humbach, *supra* note 135, at 367–68. As a practical matter, land-use law has long provided substantial protection to actual development of land through its vested rights doctrine. This body of law says that at a certain point in the development process, usually including issuance of a building permit together with some reasonable development expenditures, a landowner has established vested rights in current permitted uses which cannot be subsequently restricted by government regulations. Although what is necessary to establish vested rights varies considerably from state to state, in no state is the mere purchase price of undeveloped land, even when reflecting then permitted land uses, sufficient to establish vested rights. Perhaps the most obvious way to give content to *Penn Central's* interference with investment-backed expectations standard is through vested rights doctrine, saying that at the point of vested rights investment-backed expectations have been established sufficient to demonstrate a taking if they are interfered with, absent a nuisance. See Mandelker, *supra* note 147, at 236–37 (suggesting such an approach).

<sup>149</sup> See Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 267–68 (1996).

significant economic impacts on affected landowners. However, a takings analysis is necessarily fact sensitive and therefore agricultural zoning might constitute a taking in some situations. Most obvious, of course, is where it leaves the landowner with no economic viability. This might occur where the property is totally unsuitable for agricultural use because of size, location, or soil conditions.<sup>150</sup> Although the "economic viability" standard itself is murky, where such a finding is made, a taking should result.

Similarly, even where some economic viability remains, a taking might still be found under the *Penn Central* factors. As suggested above, this should not occur based simply on appreciated value from the time of purchase, or even where a significant loss occurs from a reasonable market purchase. A taking may be possible, however, where significant diminution in value occurs, together with what would appear to be reasonable expectations of development reflected in a purchase price. This would be particularly true if the property was singled-out for regulation rather than being part of more comprehensive planning.

As a practical matter, most agricultural zoning should not present any of these problems. This is particularly true where it occurs in a thoughtful and reasonable manner, seeking to preserve land best suited for agriculture and integrating such preservation into broader comprehensive planning. Although affected landowners might still suffer significant economic consequences, it should not be a taking.

Though establishing the above general analysis, the Supreme Court has not itself ruled on the substantive merits of an agricultural zoning regulation.<sup>151</sup> The next section of this Article therefore examines lower court decisions that have reviewed takings challenges to agricultural zoning. Though these decisions largely incorporate and reflect Supreme Court takings standards, they also vary with particular state approaches and sensitivities to the takings issue.

## B. Lower Court Decisions

Although not yet generating a substantial body of caselaw, the last several decades have seen an increasing number of cases reviewing agricultural zoning restrictions. As often occurs in land-use law, state courts have taken various

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<sup>150</sup> See generally, e.g., *Petersen v. City of Decorah*, 259 N.W.2d 553 (Iowa Ct. App. 1977) (holding agricultural zoning as applied to property unreasonable and confiscatory); *Kniec v. Town of Spider Lake*, 211 N.W.2d 471 (Wis. 1973) (holding agricultural zoning as applied to property unconstitutional).

<sup>151</sup> The Court, in *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), did decide a case in which it was alleged that restricting property to agriculture use constituted a taking. In *McDonald*, the property owner had submitted a proposal to subdivide property, currently farmland, into 159 residential lots, which was rejected by the county for a variety of reasons particular to the proposal. See *id.* at 392. The Court rejected the takings argument on ripeness grounds, however, stating that denial of a particular proposal did not constitute a final determination of permitted uses, which was necessary before a takings claim could be considered. See *id.* at 348-53.

approaches, often turning on separate state constitutional protections<sup>152</sup> or reflecting distinct state law standards for review of zoning decisions.<sup>153</sup> Even when ostensibly applying federal standards, state courts often incorporate distinct analytical approaches. Moreover, as often happens in zoning cases, courts sometimes fail to distinguish between substantive due process and takings concerns, blending them together in the course of the court's analysis. This at times makes difficult a clear understanding of how the court is treating the "takings" aspect of the case as opposed to the substantive due process aspect.

Despite these potential differences and ambiguities, lower courts have generally approached takings claims consistent with current Supreme Court jurisprudence, rejecting takings challenges in the vast majority of cases.<sup>154</sup> In doing so lower courts often apply a two part analysis similar to that articulated by the Supreme Court, which in essence incorporates the dual constitutional concerns of substantive due process and takings.<sup>155</sup> Because of the fact sensitive nature of any takings claim, however, the ultimate outcome in these cases turns on the specific facts of the case.<sup>156</sup> In analyzing the takings dimension of the above standard, courts have most often focused on whether the landowner

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<sup>152</sup> See, e.g., *Jafay v. Board of County Comm'ns of Boulder County*, 848 P.2d 892 (Colo. 1993) (applying provisions of Colorado Constitution).

<sup>153</sup> See, e.g., *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981) (applying unique Illinois multi-factor balancing test).

<sup>154</sup> See generally, e.g., *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993); *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988); *Habersham at Northridge v. Fulton County Georgia*, 632 F.Supp. 815 (N.D. Ga. 1985); *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627 (Cal. Ct. App. 1981); *Gisler v. County of Madera*, 112 Cal. Rptr. 919, (Cal. Ct. App. 1974); *County of Ada v. Henry*, 668 P.2d 994 (Idaho 1983); *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360 (Ill. App. Ct. 1993); *Racich v. County of Boone*, 625 N.E.2d 1095 (Ill. App. Ct. 1993); *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981); *Vanderburgh County Bd. of Comm'ns v. Rittenhouse*, 575 N.E.2d 663 (Ind. Ct. App. 1991); *Bell River Assocs. v. Charles Township of China*, 565 N.W.2d 695 (Mich. Ct. App. 1997); *Woolston v. Monticello Orderly Annexation Area Bd.*, No. Co-90-1389, 1990 WL 204290, at \*1 (Minn. App. Dec. 18, 1990); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991); *Eck v. City of Bismark*, 283 N.W.2d 193 (N.D. 1979); *Wilson v. Trustees Union Township*, No. CA98-06-036, 1998 Ohio App. LEXIS 5025, at \*1 (Ohio Ct. App. Oct. 26, 1998); *Smythe v. Butler Township*, 620 N.E.2d 901 (Ohio Ct. App. 1993); *Oregonians in Action v. Land Conservation and Dev. Comm'n*, 854 P.2d 1010 (Or. Ct. App. 1993); *Murray v. Columbia River Gorge Comm'n*, 865 P.2d 1319 (Or. Ct. App. 1993); *Joyce v. City of Portland*, 546 P.2d 1100 (Or. Ct. App. 1976); *Codorus Township v. Rodgers*, 492 A.2d 73 (Pa. Commw. Ct. 1985); *Chokecherry Hills Estate, Inc. v. Deuel County*, 294 N.W.2d 654 (S.D. 1980); see also, *Van Arsdell v. Township of Addison*, 195 N.W.2d 21 (Mich. Ct. App. 1972) (upholding agricultural zoning against substantive due process challenge).

<sup>155</sup> See *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 257 (N. J. 1991).

<sup>156</sup> See *id.* (stating the "application of takings principles requires a fact-sensitive examination of the regulatory scheme . . ."); see also *Codorus Township*, 492 A.3d at 76 (holding that the validity of agricultural restriction must be determined in specific context).

retained a reasonable or economically viable use of the land.<sup>157</sup> In doing so, courts have clearly put the burden on the affected property owner to establish that there is no reasonable or economically viable use left of the property. Thus, in several cases courts have readily dismissed takings challenges by saying that the owner failed to carry the burden that there were no economically viable uses of the property.<sup>158</sup>

A particularly thorough opinion in analyzing takings challenges to agricultural zoning is *Gardner v. New Jersey Pinelands Commission*,<sup>159</sup> in which the New Jersey Supreme Court upheld the agricultural zoning provisions of the Pinelands Protection Act. Those provisions significantly limited residential development in "Agricultural Production Zones," primarily restricting development to one unit per forty acres, with actual development clustered on one-acre lots and a permanent deed restriction on the remaining land.<sup>160</sup> The plaintiff, owner of a 217 acre farm, desired to subdivide his property into 14 to 17 acre "farmettes," which was denied.<sup>161</sup> He then challenged the restriction as an unconstitutional taking and sought compensation.<sup>162</sup>

The court began its analysis by emphasizing the important societal interests in farmland preservation, and noted that the restrictions on residential development clearly furthered those interests.<sup>163</sup> It then stated that the critical remaining question was whether the economic impact interfered to an "impermissible degree" with valuable property rights, in essence, asking whether it was a taking.<sup>164</sup> It began its analysis by noting that mere diminution in value, "impairment of marketability," and reduced income or profits do not by themselves constitute a taking.<sup>165</sup> Rather, a taking occurs only if a regulation denies "all practical use of property" or "substantially destroys the beneficial use of private property."<sup>166</sup> Thus, the proper focus is on the "beneficial or economic uses allowed to a property owner" in a particular context, rather than what has

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<sup>157</sup> See *Christensen*, 995 F.2d at 165; *Jafay v. Board of County Comm'rs of Boulder County*, 848 P.2d 892 (Colo. 1993); *County of Ada*, 678 P.2d at 997; *Vanderburgh*, 575 N.E.2d at 67-68; *Bell River Assocs.*, 565 N.W.2d at 700; *Woolston*, 1990 WL 204290, at \*2 (Minn. Ct. App. Dec. 18, 1990); *Gardner*, 593 A.2d at 257; *Murray*, 865 P.2d at 1320; *Wilson*, 1998 Ohio App. LEXIS 5025, at \*12.

<sup>158</sup> See *Christensen*, 995 F.2d at 165; *Bell River Assocs.*, 565 N.W.2d at 699-700; *Wilson*, 1998 Ohio App. LEXIS 5025, at \*12; *Murray*, 865 P.2d at 1320.

<sup>159</sup> 593 A.2d 251 (N.J. 1991).

<sup>160</sup> See *id.* at 256.

<sup>161</sup> See *id.* at 253, 256.

<sup>162</sup> See *id.* at 253.

<sup>163</sup> See *id.* at 257-59.

<sup>164</sup> *Id.* at 259.

<sup>165</sup> *Id.* at 259-60.

<sup>166</sup> *Id.* at 260.

been lost.<sup>167</sup>

The court then analyzed the agricultural zoning question, drawing close comparisons to the Supreme Court's takings analysis in *Penn Central*. It noted that, like *Penn Central*, the regulation permitted the property owner to continue existing use of the property.<sup>168</sup> The court also noted that under the facts of the case the plaintiff could "gainfully use all of his property," which under the particular regulation permitted building up to five homes in a cluster arrangement.<sup>169</sup> Finally, there was no showing of interference with investment-backed expectations.<sup>170</sup>

Most lower court decisions, though not engaging in the same level of analysis as *Gardner*, essentially come to the same conclusion—agricultural zoning is not a taking as long as the land is suitable for agricultural use and is economically viable.<sup>171</sup> This is particularly true where the property was purchased for agricultural use and thus, there is no interference with investment-backed expectations.<sup>172</sup> Even where property has been newly zoned, courts have not found a taking on that basis alone.<sup>173</sup> Only the Idaho Supreme Court, speaking in dictum, suggested it might under its own constitution find a taking where substantial diminution in value results from downzoning, although it acknowledged it would probably not be a taking under federal standards.<sup>174</sup>

In a few cases, however, courts focusing on economic viability or reasonable use have found takings to exist where the land was truly unsuitable for farming activity. This has typically involved situations where the agricultural classification had been used as a "holding" restriction until the government was ready to

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<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 261.

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See cases cited supra* note 157.

<sup>172</sup> *See, e.g.,* *Habersham at Northridge v. Fulton County Ga.*, 632 F.Supp. 815, 823 (N.D. Ga. 1985); *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627, 632–33 (Cal. Ct. App. 1981); *Woolston v. Monticello Orderly Annexation Area Bd.*, No. Co-90-1389, 1990 WL 204290, at \*2 (Minn. Ct. App. Dec. 18, 1990); *Chokecherry Hills Estates, Inc. v. Deuel County*, 294 N.W.2d 654, 656 (S.D. 1980).

<sup>173</sup> *See Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 163 (9th Cir. 1993); *Gisler v. County of Madera*, 112 Cal. Rptr. 919, 922–23 (Cal. Ct. App. 1974); *Gardner v. New Jersey Pinelands*, 593 A.2d 251 (N. J. 1991).

<sup>174</sup> *See generally* *County of Ada v. Henry*, 668 P.2d 994 (Idaho 1983). In *Ada* the court held that an agricultural zoning restriction did not constitute a taking when the landowners had knowledge of the restrictions when they purchased the land. *See id.* at 997. It further noted in dictum that under the then recently decided United States Supreme Court decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a taking would not occur even if property is downzoned subsequent to purchase as long as "some residual value remains in the property." *Ada*, 668 P.2d at 997. It strongly suggested, however, that it might well find a taking in such an instance under its own state constitution. *See id.*

consider development later. For example, in *Peterson v. City of Decorah*,<sup>175</sup> the Iowa Court of Appeals found an agricultural zoning "unreasonable and confiscatory" where the city acknowledged it zoned the property agricultural as a holding classification, even though it was unsuitable for agricultural use and had not been productive for years.<sup>176</sup> Similarly, in *Kmiec v. Town of Spider Lake*,<sup>177</sup> the Wisconsin Supreme Court found an agricultural restriction invalid where it was again admittedly used as a "holding" classification for future use,<sup>178</sup> despite the unsuitability of the property for farming. Indeed, as noted by the court, the land had a "negative value" as farmland since it would cost between \$150 and \$200 per acre to put the land back into farming condition, and its value as farmland would then be \$75 per acre.<sup>179</sup>

As suggested above, the majority of lower court decisions have focused on economic viability in analyzing whether agricultural zoning constitutes a taking. However, the state which has decided the most agricultural zoning cases, Illinois, takes a more distinctive approach, deciding zoning cases under a unique multi-factor balancing test, known as the *La Salle Bank* test.<sup>180</sup> This test requires courts to resolve zoning cases by balancing eight factors, including the following: examination of surrounding zoning designations, diminution in property value, the extent to which the zoning furthers the public welfare, the relative gain to the public and hardship to the restricted landowner, the suitability of the property as zoned, and the care of land-use planning behind the decision.<sup>181</sup> These factors, which blend both substantive due process and takings concerns, tend to lead to greater scrutiny of zoning decisions than typically found in most other states.

In an early and influential decision, *Wilson v. County of McHenry*,<sup>182</sup> the Illinois Court of Appeals, in a consolidation of two separate cases, held that an agricultural zoning designation requiring a minimum of 160 acre lots was valid under the above factors. The first case involved property initially zoned for one and one-eighth acre lots when the plaintiff bought it, which was later rezoned to a minimum lot size of 5 acres and eventually to the 160 acre minimum, which was

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<sup>175</sup> 259 N.W.2d 553 (Iowa Ct. App. 1977).

<sup>176</sup> *Id.* at 554-55.

<sup>177</sup> 211 N.W.2d 471 (Wis. 1973).

<sup>178</sup> *See id.* at 476-77.

<sup>179</sup> *Id.* at 474.

<sup>180</sup> The *La Salle Bank* test emerged from a seminal Illinois zoning case, *La Salle Nat'l Bank v. County of Cook*, 145 N.E.2d 65 (Ill. 1957), in which the Illinois Supreme Court articulated the basic factors that should be balanced in reviewing the validity of a zoning restriction. The number of factors have been expanded slightly over the years, but it continues to form the basic test that is applied in all Illinois zoning cases.

<sup>181</sup> *See, e.g.*, *Twigg v. County of Will*, 627 N.E.2d 742, 745 (Ill. App. Ct. 1994); *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360, 1362 (Ill. App. Ct. 1993); *Racich v. County of Boone*, 625 N.E.2d 1095, 1098-99 (Ill. App. Ct. 1993).

<sup>182</sup> 416 N.E.2d 426 (Ill. App. Ct. 1981).



challenged as a taking.<sup>183</sup> The evidence also indicated that the property was worth \$18,000 to \$20,000 per lot for 1 acre residential development, but less than \$4,000 per acre as zoned.<sup>184</sup> In the second case, the owner had owned the land for twenty years prior to the rezoning, and evidence indicated the property was worth \$1,440,000 for 1 acre residential development but only \$500,000 as farmland.<sup>185</sup> As then operated, the farms in both cases were only marginally successful economically, although there was evidence that better management practices could improve their yield and economic success.<sup>186</sup> There was also conflicting evidence in both cases about how much of the property was prime farmland.<sup>187</sup>

The court upheld the validity of the minimum 160 acre lot requirement as applied to both properties, finding that neither landowner had carried the burden of showing the unreasonableness of the restriction. Particularly significant to the court was the fact that the predominate land use in the vicinity of both properties was agricultural and that the zoning had occurred pursuant to a comprehensive planning process.<sup>188</sup> The court also stressed that neither lost profit nor diminution in value by themselves were sufficient to invalidate a zoning when a strong public interest exists.<sup>189</sup> The court found such a strong public interest in the preservation of good farmland.<sup>190</sup>

Several more recent Illinois decisions have similarly upheld agricultural zoning restrictions.<sup>191</sup> In *Harvard State Bank*, the court upheld an agricultural restriction as applied to a 64.5 acre parcel of land.<sup>192</sup> In recognizing the validity of the agricultural restriction, the court emphasized the dominant agricultural use of surrounding property, the productivity of the land in question, and the existence of a comprehensive plan.<sup>193</sup> It also noted that although the property would be worth twice as much if used for residential development,<sup>194</sup> the plaintiffs bought the land zoned agricultural, and therefore there was no interference with their expectations. Similarly, in *Racich v. County of Boone*,<sup>195</sup> the court upheld the validity of an agricultural zoning restriction, stressing the comprehensive plan and

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<sup>183</sup> See *id.* at 427–28.

<sup>184</sup> *Id.* at 429.

<sup>185</sup> See *id.* at 432.

<sup>186</sup> See *id.* at 429–31.

<sup>187</sup> See *id.* at 428–32.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* at 429.

<sup>190</sup> See *id.* at 430.

<sup>191</sup> See *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360 (Ill. App. Ct. 1993).

<sup>192</sup> See *id.* at 1364–66.

<sup>193</sup> The parcel was worth \$258,000 zoned agricultural, whereas it would be worth \$516,000 if zoned to permit residential development on one acre lots. See *id.* at 1363.

<sup>194</sup> See *id.* at 1363–64. The court also noted that even though the property was zoned agricultural, it had increased in value by \$32,000 from the time the plaintiffs had purchased it.

<sup>195</sup> 625 N.E.2d 1095 (Ill. App. Ct. 1993).

the thoroughness of the farmland rating system, and that any loss in value was a mere "expectancy."<sup>196</sup>

However, on several occasions Illinois courts have struck down agricultural zoning under its multi-factor balancing. In two earlier cases, *Semja v. County of Boone*<sup>197</sup> and *Pettee v. County of DeKalb*,<sup>198</sup> the property was largely unsuitable for agricultural use. In *Semja* a majority of the property was comprised of either woods or "sub-marginal" farmland.<sup>199</sup> Similarly, in *Pettee* a substantial part of the property had significant drainage problems; it was therefore unsuitable for farming.<sup>200</sup>

Illinois courts again struck down agricultural zoning provisions in two more recent decisions—*Harris Bank of Hinsdale v. County of Kendall*<sup>201</sup> and *Twigg v. County of Will*.<sup>202</sup> Significantly, unlike *Semja* and *Pettee*, there was no indication in either *Harris Bank* or *Twigg* that the property was unsuitable for farming or could not be profitable with that use.<sup>203</sup> Nevertheless, both decisions upheld trial court determinations that found the restrictions invalid under a balancing of the *La Salle* factors.<sup>204</sup> Although the courts considered several factors, including the compatibility of the proposed changes with surrounding uses, both particularly emphasized the lack of thoughtful planning evidenced in the agricultural restrictions. In *Harris Bank* the court stressed that the zoning was inconsistent with the county's own comprehensive plan, which placed the property in an "urbanizing area."<sup>205</sup> Similarly, in *Twigg*, the court characterized the zoning of the entire area, including the land in question, as being done in an "arbitrary" manner and that the "land use plan was not carefully designed."<sup>206</sup> Neither court placed much emphasis on the economic impact—with the *Twigg* court noting it was "not determinative," but a factor in the landowner's favor,<sup>207</sup> while the *Harris Bank* court ignored it altogether.<sup>208</sup>

Generally speaking, these Illinois cases applying the unique *La Salle* balancing test apply a level of scrutiny greater than found in most states when

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<sup>196</sup> See *id.* at 1098–99.

<sup>197</sup> 339 N.E.2d 452 (Ill. App. Ct. 1975).

<sup>198</sup> 376 N.E.2d 720 (Ill. App. Ct. 1978).

<sup>199</sup> See *Semja*, 339 N.E.2d at 455.

<sup>200</sup> See *Pettee*, 376 N.E.2d at 725.

<sup>201</sup> 625 N.E.2d 845 (Ill. App. Ct. 1993).

<sup>202</sup> 627 N.E.2d 742 (Ill. App. Ct. 1994).

<sup>203</sup> See *Twigg*, 627 N.E.2d at 746; *Harris*, 625 N.E.2d at 846.

<sup>204</sup> Both courts stressed deference to how the trial courts assessed and weighed the *La Salle Bank* factors. See *Twigg*, 627 N.E.2d at 745; *Harris*, 625 N.E.2d at 848–50.

<sup>205</sup> See *Harris*, 625 N.E.2d at 846.

<sup>206</sup> See *Twigg*, 627 N.E.2d at 746.

<sup>207</sup> See *id.* at 748.

<sup>208</sup> See *Harris*, 625 N.E.2d at 845–51.

reviewing zoning decisions.<sup>209</sup> Moreover, the test itself is a blend of several considerations, including both substantive due process and takings concerns, and thus does not fit neatly into a more traditional takings analysis. Nevertheless, the cases generally affirm that if done right, agricultural zoning should not pose takings problems. Importantly, though recognizing that the economic impact on the affected landowner is a factor to be considered, the cases indicate that this alone will not result in a taking when balanced against benefits to the public.<sup>210</sup> Rather, agricultural zoning will be invalid only when the property is unsuitable for agricultural use, or the restriction is not pursuant to sound zoning principles, such as proper use of a comprehensive plan.

It should be noted, of course, that courts in any jurisdiction will occasionally invalidate agricultural zoning on grounds other than takings. For example, in *City of Virginia Beach v. Virginia Land Assessment Assoc. No. 1*,<sup>211</sup> the Virginia Supreme Court struck down an attempt to downzone four hundred acres of land from a planned unit development to an agricultural district. Virginia law required that for such "piecemeal" downzoning to be valid, a "change or mistake" from the prior zoning had to be shown,<sup>212</sup> which the city failed to do. The city admitted that there were no changed circumstances to justify the rezoning, nor had any fraud or mistake been shown.<sup>213</sup> Importantly, however, the court also rejected the landowner's claim for interim damages, specifically stating that the downzoning did not constitute a taking because the agricultural restriction did not deprive the owner of "all economically viable use of the property."<sup>214</sup>

An earlier and often cited decision that struck down an agricultural zoning scheme is *Hopewell Township Board of Supervisors v. Golla*.<sup>215</sup> There the Pennsylvania Supreme Court reviewed a sliding scale agricultural zoning ordinance that permitted clustering of residential units, but permitted no more than five contiguous one and one-half acre residential lots, regardless of the size

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<sup>209</sup> Commentators have generally characterized Illinois courts as more closely scrutinizing zoning decisions than courts in other states. See ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS* 75-76 (1981); NORMAN WILLIAMS, JR., *AMERICAN LAW OF ZONING* § 6.16 (1988).

<sup>210</sup> See, e.g., *Racich v. County of Boone*, 625 N.E.2d 1095, 1098-99 (Ill. App. Ct. 1993); *Wilson v. County of McHenry*, 416 N.E.2d 426, 429 (Ill. App. Ct. 1981).

<sup>211</sup> 389 S.E.2d 312 (Va. 1990).

<sup>212</sup> *Id.* at 314. Several states follow what is known as the "change or mistake" rule in reviewing rezonings. This rule states that for a rezoning to be valid the local government must show either that conditions have changed since the original zoning to justify the change or that the original zoning was based on a mistake of some type. See generally, DANIEL MANDELKER, *LAND USE LAWS* 227-29 (2d ed. 1988).

<sup>213</sup> See *Virginia Land Assessment Assoc.*, 389 S.E.2d at 314.

<sup>214</sup> *Id.*; see generally *Grand Land Co. v. Township of Bethlehem*, 483 A.2d 818 (N.J. 1984) (invalidating restriction but specifically stating that agricultural zoning did not constitute a taking because it permitted economically viable use of the property).

<sup>215</sup> 452 A.2d 1337 (Pa. 1982).

of the overall tract.<sup>216</sup> As applied to the plaintiff's 140 acres, this permitted a 7½ acre development and a residual 132½ acre farm.<sup>217</sup> A plurality of the court found the ordinance unconstitutional for two reasons. First, by limiting development to no more than five lots "regardless of the size of the original tract, an unreasonably severe limitation [was] placed upon permissible land uses."<sup>218</sup> In this regard it also stated that the need to establish "an agricultural tract as large as 132 1/2 acres" was not clearly shown.<sup>219</sup> Second, it also found that the scheme unreasonably discriminated against large lot owners in favor of small lot owners by limiting total residential lots to five.<sup>220</sup>

Although *Hopewell* touched upon takings concerns in finding the scheme unreasonably severe upon large lot owners, its analysis was primarily grounded in substantive due process.<sup>221</sup> Moreover, *Hopewell* was greatly limited three years later in *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*,<sup>222</sup> where the Pennsylvania Supreme Court upheld another agricultural zoning ordinance using a sliding scale allocation method. The ordinance was very similar to the one struck down in *Hopewell*, but did not cap the maximum number of residences at a particular point, instead permitting one additional residential unit per thirty acres of land. However, it did impose a maximum of two dwellings permitted on *prime* farmland, regardless of tract size.<sup>223</sup>

The court upheld this sliding-scale allocation scheme as constitutional, distinguishing it from *Hopewell* on the basis that, unlike *Hopewell*, it related residential development to tract size.<sup>224</sup> However, it also upheld the maximum two-dwelling limit on prime farmland irrespective of tract size, acknowledging it was very similar to the fixed scale struck down in *Hopewell*, but stating it should be viewed as part of the broader scheme.<sup>225</sup> As a practical matter, *Shrewsbury* significantly limited *Hopewell* and provides Pennsylvania local governments with substantial flexibility in implementing agricultural zoning. In particular, *Shrewsbury* affirmed the validity of large lot agricultural zoning as a means of preserving farmland, and in the case of prime farmland, the decision approved the use of potentially significant restrictions.

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<sup>216</sup> See *id.* at 1338–39.

<sup>217</sup> See *id.* at 1343.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See *id.*

<sup>221</sup> See *Codorus Township v. Rodgers*, 492 A.2d 73, 75 (Pa. Commw. Ct. 1985) (stating that the "thrust" of *Hopewell* was directed at irrational results under substantive due process).

<sup>222</sup> 491 A.2d 86 (Pa. 1985).

<sup>223</sup> See *id.* at 88–89.

<sup>224</sup> See *id.* at 91.

<sup>225</sup> See *id.* at 92.

In sum, lower courts have generally affirmed the constitutional validity of agricultural zoning, and in particular that it should not pose a takings problem if done pursuant to sound planning.<sup>226</sup> Although often blending substantive due process with takings concerns, and at times turning on the unique features of state law, the decisions largely affirm and are consistent with Supreme Court takings jurisprudence. In particular, lower courts have consistently rejected takings challenges as long as the property was economically viable as farmland, even when there was a substantial diminution in property value. The only apparent exceptions to this are the *Harris Bank* and *Twigg* decisions in Illinois, both of which not only applied that state's unique balancing test, but also emphasized the lack of proper planning in zoning the property agricultural.<sup>227</sup> On the other hand, courts have been willing to strike down agricultural zoning in limited situations, such as where the property is truly unsuitable for farming.<sup>228</sup>

Significantly, these cases clearly establish, consistent with the Supreme Court's own analysis, that substantial diminution in value or economic impact on the landowner is not enough to establish a taking. Even Illinois courts, which apply the most scrutiny to zoning restrictions and include diminution in value as a factor in their analysis, have not placed much emphasis on it. However, the question remains whether substantial diminution in value pursuant to agricultural zoning, though not constituting an unconstitutional taking, is nevertheless unfair to landowners and should be avoided for that reason. The next section will address that issue.

#### IV. FAIRNESS IN FARMLAND PRESERVATION

Beyond the constitutional challenge that agricultural zoning constitutes a taking, is the equally common assertion that it is unfair because it forces a few landowners to bear the cost of preserving farmland for the benefit of many. This fairness argument is not unique to farmland preservation, but is often asserted with a variety of environmental regulations.<sup>229</sup> However, it is most forcefully

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<sup>226</sup> See cases cited *supra* note 154.

<sup>227</sup> See *Twigg v. County of Will*, 627 N.E.2d 742, 746 (Ill. App. Ct. 1994); *Harris Bank of Hinsdale v. County of Kendall*, 625 N.E.2d 845, 851 (Ill. App. Ct. 1993).

<sup>228</sup> See *Semja v. County of Boone*, 339 N.E.2d 452, 453–55 (Ill. App. Ct. 1975); *Petersen v. City of Decorah*, 259 N.W.2d 553, 554–55 (Iowa 1977); *Kniec v. Town of Spider*, 211 N.W.2d 471, 476–77 (Wis. 1973).

<sup>229</sup> See Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C.L. REV. 613, 636 (1995); see also Marianne Lavelle, *The "Property Rights"*, NAT'L L.J., May 10, 1993 at 1, 34 (discussing impetus for property rights movement); *Private Property Rights and Environmental Laws: Hearing Before the Senate Comm. on the Env't. & Pub. Works*, 104th Cong. 171, 172 (1995) (statement of Steven J. Eagle, professor at George Mason Law School) (stating that compensation required as a matter of fairness); see *id.* at 163–65 (statement of Jonathan Adler, Associate Director of Environmental Studies for the Competitive Enterprise Institute) (stating that if the public wants

made with regard to environmental regulations that restrict environmentally sensitive land, which often affect a limited number of property owners with substantial diminution in value to bestow benefits on society as a whole.

The essence of the fairness argument is that environmental regulations, like farmland preservation, force a few landowners to bear the cost of preserving farmland for the benefit of society more generally. As noted earlier, the need for government intervention to preserve farmland is that most of the benefits from preservation in terms of food security and environmental amenities go to society as a whole, rather than the affected landowner.<sup>230</sup> Thus, the argument is made that if most of the benefits from farmland preservation go to society as a whole, then the cost of preservation should be placed on society as well.

The perceived unfairness of requiring affected landowners to bear the cost of agricultural preservation is exacerbated by what might be seen as two distinctions between restrictions on environmentally sensitive land and more typical zoning restrictions. First, whereas most zoning restrictions typically permit some development, such as single-family residential, restrictions on environmentally sensitive land prohibit development altogether. This is viewed as a more extreme regulation and often, though not inevitably, results in a greater diminution in value than might result from other zoning regulations.<sup>231</sup>

Second, efforts to preserve environmentally sensitive land often are perceived as affecting only a limited number of property owners and lack the reciprocal benefits often found in other zoning contexts. For example, a typical single-family zoning restriction will apply evenly to a wide number of property owners, thus imposing comparable burdens and bestowing benefits to a large number of similarly situated landowners. In contrast, restrictions on environmentally sensitive land often restrict a more limited number of property owners with the benefits more clearly going to broader society.<sup>232</sup>

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to protect private land with environmental value, then the public should be willing to pay for it through provision of compensation).

<sup>230</sup> In economic terms this would be viewed as an "externality" problem, because most of the benefits of farmland preservation will be external to the decisionmaking process in that they go to society as a whole. Although externalities do not always result in an inefficient use of resources, they often do by failing to consider the full range of cost and benefits from the decision. This might well be the case with regard to agricultural zoning.

<sup>231</sup> The actual diminution in value will, of course, depend on various factors, particularly the percentage of the property subject to the restriction. If the entire parcel is subject to a restriction to keep the property in its natural state, the diminution in value can be substantial, since it likely prohibits development altogether. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (stating that the most obvious instance of "no economic viability" is where property must be left in its natural state).

<sup>232</sup> See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 361 (1997) (noting how under the Endangered Species Act "[r]egulated property owners constitute only a small fraction of the population that enjoys [the Act's] benefits," yet neighbors and the broader public who enjoy the benefits do not have

As thus presented, the fairness argument does not necessarily dispute the wisdom of farmland preservation, but instead questions who should pay for it. Whatever the merits of preservation, it is arguably unfair to force a few landowners to bear the burden of bestowing benefits on the rest of society.<sup>233</sup> Thus, the argument is made that if the benefits from preservation go to society as a whole, then society should pay for such benefits in the form of compensation to affected landowners.<sup>234</sup> For this reason alternative preservation schemes involving Purchase of Development Rights or Transferrable Development Rights are viewed as more equitable in that they shift the cost of preservation from the regulated landowner back to society.

The above fairness argument—very much at the heart of the current property rights debate and farmland preservation efforts—has substantial intuitive appeal. Moreover, despite its elusive nature, fairness remains a central component of any serious discussion of the relative balance of property rights and environmental regulation.<sup>235</sup> Even assuming the constitutionality of agricultural zoning, fairness is an important component in setting policy and affects the political acceptability of alternative outcomes.<sup>236</sup> Thus, some discussion of the fairness of agricultural zoning, beyond its general constitutionality, is warranted.

Though quite important, the idea of fairness in land use controls is admittedly both vague and quite subjective. However, as a general matter, it most sensibly concerns how the burdens and benefits of land use controls should be shared and distributed across society. More particularly, the fairness critique of agricultural zoning turns on a perception that regulated property owners are forced to give up substantial property interests, reflected in diminution of property values, in order

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to pay).

<sup>233</sup> One leading proponent of the property rights movement puts it this way: "The property rights movement is not seeking less environmental protection; it asks only that a few unlucky landowners not be forced to bear an unfair share of the burdens imposed by such regulations." Marzulla, *supra* note 229, at 639.

<sup>234</sup> See Michael M. Berger, *Dollars and Damages: A Debate—Yes! It's the Fair Thing to Do*, PLANNING, Mar. 1996, at 22–24 (arguing in favor of legislation requiring compensation to landowners when environmental regulations diminish property values).

<sup>235</sup> Courts and commentators have often noted that fairness is a central concern in analyzing regulatory takings. In recent years the Supreme Court has often stated that the takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong*, 364 U.S. at 49); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1977) (quoting *Armstrong*, 364 U.S. at 49). Commentators have similarly noted the centrality of fairness in takings jurisprudence. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 6 (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171–72 (1967); see also Lazarus, *supra* note 12 (discussing importance of addressing fairness concerns in environmental law).

<sup>236</sup> See Lazarus, *supra* note 12.

to bestow benefits on the rest of society.

Though it admittedly has some intuitive appeal, the argument that agricultural zoning is inherently unfair is overstated for several basic reasons. First, it presumes that the entire profit potential of private property has somehow been earned by the landowner, when in fact a substantial portion of private property value is often established by government "givings." Recognizing this necessarily tempers the perception of unfairness when agricultural zoning reduces profit potential. Second, the concept of fairness concerns an understanding of not only how burdens and benefits are distributed within a single government action, but must also focus on the reciprocal nature of burdens and benefits within society more broadly. Even though one might be burdened by a particular land use regulation, fairness is provided through reciprocal benefits in other regulatory contexts. Third, the fairness critique of agricultural zoning emphasizes the private development perspective of property rights, without recognizing the social dimension of property ownership integral to our legal system. This social dimension of property indicates that restricting land to agricultural use for the common good can be viewed as an inherent limitation in the property rather than a deprivation of rights.

Each of these three points will be discussed below briefly. Together they indicate that agricultural zoning is not inherently unfair, even when it results in substantial diminution in value. This is not to say that agricultural zoning is never unfair; certainly it, like any other land use control, might be unfair as applied to a particular tract of land. Nor should it preclude some modified use of PDR or TDR programs to provide some compensation to landowners in order to more evenly distribute the regulatory burden between affected landowners and the broader public. But viewed from a broad perspective, the following subsections demonstrate that restricting land to agricultural use without accompanying compensation should not be viewed as inherently unfair.

#### A. *"Givings" and Fairness*

Central to the fairness critique of agricultural zoning is the idea that regulated property owners suffer substantial economic loss in order to benefit the rest of society. This presupposes that landowners have a valid claim to all the market value of their property. Thus, when the value of land is greatly reduced by agricultural zoning relative to development potential, landowners perceive a substantial loss of their wealth to the public as a whole.

The perceived unfairness of lost value is substantially lessened, however, when recognizing that a substantial portion of that value was added by government activity to begin with. As noted by various commentators, much of the value of farmland is a result of government givings, actions by government



which enhance the value of the regulated land.<sup>237</sup> This might occur with farmland in numerous ways, such as farm subsidy programs<sup>238</sup> and mortgage deductions, both of which indirectly enhance farmland values.<sup>239</sup>

Government action also enhances land values by minimizing the harms that might otherwise affect landowners, especially those arising from incompatible land uses. Thus, the very scheme of restricting property use adds significant value to neighboring property.<sup>240</sup> Specifically, the increased value of agricultural land in alternative, residential use in part exists because government zoning would protect any residential development from conflicting industrial and commercial uses. Any arguments based on diminution in value necessarily reflect property values largely enhanced by protective government regulatory schemes. As recently noted by several leading land use scholars, "much of the value that some advocates today want to protect against regulation exists in significant part because of the protection of the regulatory system they challenge."<sup>241</sup>

Perhaps the most obvious example of government givings in regard to farmland subject to development pressure is basic infrastructure support that makes land developable in the first instance. This is particularly relevant with regard to farmland preservation issues, where conversion pressure and enhanced land values are the result of government support. Therefore, the value of land for intensive development largely reflects government investment rather than the mere initiative of landowners. In particular, road and other infrastructure support, which makes land developable in the first instance, are paid primarily by general tax revenues and yet often result in disproportionate financial benefit to undeveloped land, often farmland, in proximity to development. It is not obviously unfair in such situations to preserve farmland with the result that some of the publicly created value of the land is, in effect, returned to the public.

Edward Thompson makes this point forcefully in the context of the *Lucas* decision, discussing the various ways in which the value of Mr. Lucas's property

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<sup>237</sup> See *Private Property Rights and Environmental Laws: Hearing Before the Senate Comm. on the Env't & Pub. Works*, 104th Cong. 163, 163-65 (1995) (statement of C. Ford Runge, Professor, Dept. of Agriculture and Applied Economics, University of Minnesota) (discussing various ways government actions enhance private property values); Donald L. Elliott, *Givings and Takings*, LAND USE L. AND ZONING DIG., Jan. 1996, at 3; Edward Thompson, Jr., *The Government Giveth*, ENVTL. FORUM, Mar./Apr. 1994 at 22.

<sup>238</sup> See C. Ford Runge and Tim Searchinger, *Who's Really Getting Taken? The Last Thing We Need is a Vast New Entitlement Program for Landowners*, NEW DEMOCRAT, Sept./Oct. 1995, at 27, 28; Thompson, *supra* note 237, at 22-23.

<sup>239</sup> See Thompson, *supra* note 237, at 23 (noting that income tax deduction for mortgage interest is capitalized into home values).

<sup>240</sup> See DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328-29 (2d ed. 1986).

<sup>241</sup> Daniel R. Mandelker et al., *Good Planning, Consistent Regulation, and Fair Decision-Making: A Prescription for Avoiding Takings Challenges*, at 10 (1996) (paper prepared for American Planning Association's Property Rights Task Force, on file with author).

was enhanced by government "givings." He states:

Whether or not one agrees with the decision in his case, the fact remains that both Lucas's ability to build on the beach and the value of his beachfront lots were augmented by government action. Public authorities had constructed a bridge to provide access to the island, roads to drive on, water and sewage systems to serve the houses, and beach protection measures to prevent them from washing away. On top of that, the government has helped underwrite flood insurance to cushion the loss when those measures fail. All of these taxpayer-financed improvements contributed to the value of Lucas's property and in all likelihood spelled the difference between its being attractive for development and a financially worthless strip of shifting sand. In effect, much of the government's financial exposure for taking the Lucas property was attributable to the government itself.<sup>242</sup>

Thompson does not necessarily disagree with the *Lucas* result, but argues for recognition of government givings as well as takings in the property rights debate. He further notes the potential problem of property owners "double dipping in the public treasury" by receiving benefits from government actions which give significant value to land and then being compensated when environmental regulations reduce land values.<sup>243</sup> This is potentially unfair to the public at large by requiring that they, in effect, pay affected landowners twice: once through paying for infrastructure supports that greatly enhance property values, and a second time through compensatory payments when environmental regulations diminish property values.

This discussion of givings is not meant to ignore or minimize the role of private enterprise in enhancing land values. Certainly property worth reflects substantial private as well as public initiative. Nor is it meant to completely foreclose the possibility of some compensatory scheme in preserving farmland. However, it does indicate that reduced land values often reflect only a taking back of what the government itself has created, which can hardly be labeled unfair.<sup>244</sup>

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<sup>242</sup> Thompson, *supra* note 237, at 22.

<sup>243</sup> See *id.* at 26.

<sup>244</sup> It is important to note, of course, that in recent years developers have been increasingly required to pay for some infrastructure costs through exaction requirements, typically in the form of land dedications and impact fees. See generally ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE, 19-20, 35-39 (1994); Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 L. & CONTEMP. PROBS. 51, 62 (1987). It might therefore be argued that through the practice of exactions landowners themselves pay for the enhanced value of the land. This is subject to two significant limitations. First, property values are substantially enhanced by government activities not typically financed by exactions, such as major highways. Second, the amount of exactions can only correspond to the burden imposed by the development, not the enhanced property values created by the infrastructure. See *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994) (requiring "rough proportionality" between exaction and development impact). As a

It also suggests that loss of truly deserved land value is often not nearly as great as might at first appear. To the extent it does exist, it is often more attenuated and must be seen in the context of the give and take of broader regulatory efforts, which is the focus of the next subsection of this Article.

### *B. Reciprocity and Distributive Fairness*

Closely related to the idea of government givings is the concept of reciprocity, which similarly suggests that agricultural zoning is not inherently unfair. Frequently emphasized by the Supreme Court in its takings analysis,<sup>245</sup> reciprocity essentially refers to the idea that government regulations typically bestow both reciprocal benefits and burdens. In a limited sense, this might refer only to benefits and burdens flowing from the same regulation, what might be called specific reciprocity.<sup>246</sup> In the case of zoning, for example, individual landowners are burdened by restrictions placed on their land, but receive benefits from similar restrictions placed on other property. As a practical matter, the benefits and burdens from a specific regulation might not be distributed evenly, nor do the benefits necessarily outweigh the burdens. Yet reciprocal benefits serve to at least partially offset losses and burdens imposed by the same regulation.

Reciprocity can also be viewed from a more general perspective, in which the reciprocal benefits and burdens of regulatory life in general are considered, as opposed to only those flowing from a specific regulation.<sup>247</sup> The Supreme Court is arguably alluding to general reciprocity when it says that it is usually fair to assume that legislation is simply "adjusting the benefits and burdens of economic life" to secure an "average reciprocity of advantage."<sup>248</sup> Thus, even if a particular restriction might not provide significant reciprocity for an affected party, there are likely other instances in which the party receives benefits at the expense of others. Over the long run, such benefits and burdens tend to even out.<sup>249</sup>

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practical matter, the enhanced value of property through exactions imposed by government in its coordinating function far exceeds the cost of the exaction.

<sup>245</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017–18 (1992); *Penn Central*, 438 U.S. at 124; *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). For general discussions of the Supreme Court's treatment of reciprocity in takings analysis, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990); Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997).

<sup>246</sup> See Cordes, *supra* note 13, at 236.

<sup>247</sup> See *id.* at 236–37.

<sup>248</sup> *Lucas*, 505 U.S. at 1017–18 (quoting *Pennsylvania Coal*, 260 U.S. at 415); *Penn Central*, 439 U.S. at 124.

<sup>249</sup> Professor Frank Michelman makes this point in his seminal article on takings, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation*

The perceived unfairness of agricultural zoning in part results from a lack of specific reciprocity in such restrictions. Although the degree of specific reciprocity for affected landowners depends on a number of variables, it is fair to assume that in many instances any reciprocal benefits from agricultural zoning are quite limited. As noted earlier, most of the benefits from agricultural zoning go to neighbors and broader society. Although the regulated landowner shares in such benefits, that person's share will likely be quite small when compared to the potential financial loss, especially if nearby property is permitted to develop. This results in a perception that the benefits and burdens of regulation are unevenly distributed, which understandably touches on issues of fairness.

From the broader perspective of general reciprocity, however, there is little doubt that affected owners of regulated farmland receive substantial reciprocal benefits from regulatory life in general. As discussed in the previous subsection, this might involve givings in terms of farm subsidies and infrastructure development, as well as the substantial benefits from land use controls on surrounding property. Farm property also benefits from various environmental protections on surrounding land, such as wetlands and floodplain controls. On a broader level, as members of society, owners of farmland benefit from numerous economic and social regulations designed to facilitate commerce and protect citizens from the harmful consequences of economic activity.

Any serious fairness argument must recognize the significant regulatory benefits that flow to landowners from other regulations. To focus only on the burden from a particular regulation distorts the regulatory equation, making government accountable for the burdens imposed, but not for the benefits created. For all practical purposes, this would make almost all government regulatory efforts vulnerable to charges of unfairness, because when viewed in isolation most regulations will burden some parties more than others.

The more proper perspective, as suggested by the Supreme Court, is to recognize that the burdens imposed from any particular regulation are simply part of "adjusting the benefits and burdens of economic life."<sup>250</sup> From this perspective any perceived distributive unfairness from agricultural zoning is necessarily mitigated by the regulatory benefits bestowed on such landowners in other ways.

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*Law*", 80 HARV. L. REV. 1165 (1967):

Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed "evenly" enough so that everyone will be a net gainer.

*Id.* at 1225.

<sup>250</sup> *Lucas*, 505 U.S. at 1017-18 (quoting *Pennsylvania Coal*, 260 U.S. at 415); *Penn Central*, 439 U.S. at 124.

This is not meant to suggest that the balance of burdens and benefits always evens out in the long haul, which might not always be the case.<sup>251</sup> It does mean, however, that our understanding of fairness must be based on a broad perspective, tempering any perceived unfairness based on burdens from a land use restriction viewed in isolation.

### *C. Property Rights and Landowner Expectations*

A third general response to the fairness argument concerns the nature of property rights and landowner expectations. The argument that agricultural zoning is unfair, because it forces a few landowners to suffer loss for the benefit of broader society, is in part predicated on the idea that private property ownership includes the right to use the property as the owner chooses. Thus, agricultural zoning and similar restrictions are viewed as forcing landowners to forego opportunities that are interwoven in their rights as property owners to benefit society. The forced loss of what are seen as normal property rights without compensation exacerbate fairness concerns.

However, as a number of legal commentators have noted, such a perspective is neither the traditional nor the proper way to view property rights.<sup>252</sup> Rather, our legal system has long recognized that private property interests are subject to broader public uses.<sup>253</sup> This has been referred to at times as the social function<sup>254</sup> or social obligation of property, indicating that property ownership must be seen in a broader social setting with responsibilities as well as rights. Thus, restricting property to agricultural use does not necessarily involve the deprivation of property rights, but rather asserting a limitation inherent in the property use itself.

This social dimension to private property is most clearly seen in nuisance law, which requires that one not use property so as to cause an unreasonable harm

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<sup>251</sup> Agricultural Economist C. Ford Runge, however, has argued that the vast majority of farmland and natural resource land is owned by large landowners, and such owners tend to be net winners in the big picture from government activity. See *Private Property Rights and Environmental Laws: Hearing Before the Senate Comm. on the Env't. & Pub. Works*, 104th Cong. 163, 163–65 (1995).

<sup>252</sup> See generally Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996).

<sup>253</sup> See, e.g., Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 751–52 (1985) (discussing restrictions on perceived noxious activity in early America); Duncan, *supra* note 252 at 1133–37 (discussing types of restrictions on property use found in early America); Rose, *supra* note 252 at 274–82 (same); see also Lucas, 505 U.S. at 1055–60 (Blackmun, J., dissenting) (discussing types of land use restrictions in colonial period).

<sup>254</sup> See Gerald Torres, *Takings and Givings: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 5 (1996).

to others.<sup>255</sup> Beyond that, however, courts have long held that use of private property is subject to the common good and public rights. For example, as long ago as 1846 the Massachusetts Supreme Court, in upholding a prohibition on owners removing sand or stone from private beaches, stated that “[a]ll property is acquired and held under the tacit condition that it shall not be so used to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community . . . .”<sup>256</sup> The widespread growth and acceptance of land use restrictions in the early part of this century similarly reflects judicial recognition that property interests are limited by social needs. Indeed, the Supreme Court itself recognized this principle in a number of decisions during this period, frequently stating that property ownership is limited by public needs.<sup>257</sup>

This longstanding recognition that private property is subject to public interests flows from the fact that property is a social construct<sup>258</sup> and society can legitimately define the extent of private property interests to be limited by social concerns. Construing property interests in this manner recognizes that the consequences of property use inevitably extend beyond land boundaries and will often conflict with other social needs, necessitating a reasonable accommodation of interests. This includes not only the avoidance of nuisance-like behavior, but also protection of sensitive lands, including prime farmland, as an environmental and social resource.<sup>259</sup> Although the need to encourage investment in property

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<sup>255</sup> The prohibition on creating a nuisance to surrounding property owners has long been recognized in English and American property law. What constitutes a nuisance, and how the balance is drawn between competing property uses, has evolved over time, reflecting changing societal values. See, e.g., Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 100–01 (discussing evolution of nuisance law in Anglo/American property law and noting how it illustrates the “inherent ambiguity of absolute ownership”).

<sup>256</sup> *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57 (1846). For a discussion of *Tewksbury* and other early cases that clearly show that private property was subject to public rights, see Duncan, *supra* note 252.

<sup>257</sup> See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (holding that private property interests must at times “yield to the good of the community” for the sake of “progress”); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (stating that private property limited by other public interests, including exercise of the police power “to protect the atmosphere, the water and the forests”); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (“all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”).

<sup>258</sup> Scholars and legal commentators have often noted that property is a social creation of the state. See, e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 182 (1995); Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction?*, 17 VT. L. REV. 647, 653–55 (1993); Coletta, *supra* note 245, at 361–63.

<sup>259</sup> Recent years have seen a growing understanding of the critical environmental role played by certain lands, such as wetlands and coastal zones, and their interconnectedness with the rest of nature. A growing body of legal scholarship is noting how understandings of private property must adapt to this changing understanding of ecology. This includes recognition that

requires protection of private interests in many instances, it is reasonable to view those private interests as ending when they interfere with broader social interests.<sup>260</sup>

It is important to emphasize that this accommodation between private and public interests is an inherent limitation in the nature of private property to begin with, rather than a deprivation of interests. Thus, fairness arguments predicated on the deprivation of private interests for the public good are misplaced. To the extent that agricultural zoning is designed to protect the public interest in a valuable resource, it is simply asserting a limitation inherent in the property ownership to begin with. Certainly, sensitivity to the impact on private parties is called for in such situations, but in discussing fairness it should not be viewed as taking an established right from regulated landowners. The assertion of inherent limitations is both reasonable and arguably fair.

For similar reasons, agricultural zoning is not necessarily an unreasonable interference with landowner expectations. As discussed in Part III.A with regard to takings, the fairness of agricultural zoning relative to landowner expectations is most clearly seen with regard to instances where property was purchased with agricultural restrictions in place and the landowner is unsuccessfully seeking a more intensive rezoning of the property. Although refusal to rezone in such a situation might result in significant loss of potential profit, maintaining current restrictions designed to preserve public values can hardly be viewed as unfair. Even where the purchase price reflects the potential for intensive development, this is speculation on possible change and hardly deserving of compensation.<sup>261</sup>

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such sensitive lands are affected with a public interest that necessarily must limit development. *See, e.g.,* Freyfogle, *supra* note 255, at 109–14, 135–38; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442–49 (1993). Prime farmland clearly fits within this idea of valuable environmental and social resource land. Not only does it confer environmental benefits not unlike other sensitive lands, but is the source of our current and future food production.

<sup>260</sup> *See, e.g.,* Hadachek v. Sebastian, 239 U.S. 394, 410 (1915) (stating that private property interests must at times “yield to the good of the community”); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (“all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”); *Commonwealth v. Alger*, 7 Cush. 53, 84–85 (Mass. 1851) (“every holder of property . . . holds it under” limitation that it not be injurious to others and held subject to “those general regulations, which are necessary to the common good and general welfare”).

<sup>261</sup> Courts have frequently commented that there is nothing unfair nor any interference with reasonable expectations when landowners buy property with restrictions in place and have requests for zoning changes denied, as long as the property remains profitable as originally zoned. *See, e.g.,* *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815, 823 (N.D. Ga. 1985); *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627, 632–33 (Cal. Ct. App. 1981); *County of Ida v. Henry*, 668 P.2d 994, 997 (Idaho 1983); *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360, 1363–64 (Ill. App. Ct. 1993); *Racich v. County of Boone*, 625 N.E.2d 1095, 1099 (Ill. App. Ct. 1993); *Woolston v. Monticello Orderly Annexation Area Bd. No. CO-90-1398*, 1990 WL 204290 (Minn. App. Dec. 18, 1990); *Chokecherry Hills Estates, Inc. v. Deuel*

The fairness concern over expectations is admittedly stronger, however, when property is downzoned, reflecting substantial diminution in value. Even if such a loss does not constitute a taking for the reasons discussed in Part III, there is still arguably an element of unfairness in creating a significant loss for the benefit of others. This is, of course, exacerbated if the loss is concentrated on only a few landowners, with the benefits from regulation going to a more diffuse public.

Even here, however, legitimate fairness issues are tempered when seen in a broader context. First, the previous discussion on givings and reciprocity is relevant in that some of the lost value has often been created by government, and losses that remain must be seen in the broader regulatory context. More significantly, the idea of regulatory risk also tempers fairness concerns in such situations. As noted earlier, the Supreme Court has developed this theme in several cases, stating that the risk of regulation is part of economic life, which includes the possibility of economic loss.<sup>262</sup> In *Lucas*, the Court specifically applied this idea to land use regulation, stating that “[i]t seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers.”<sup>263</sup> Thus, since reasonable expectations necessarily incorporate the possibility of land use restrictions, expectations are not unfairly interfered with when such restrictions are imposed.<sup>264</sup>

The validity of this regulatory risk argument in part turns on the foreseeability of regulation. For example, discovery of an endangered species on property that greatly limits the property’s use and consequently reduces its value is largely unexpected. Even though at one level such risk can be taken account of, as a practical matter it is typically unanticipated and concentrated on a few owners, and thus arguably raising fairness concerns justifying compensation.<sup>265</sup> In contrast, restrictions on land use are more readily anticipated in our society,<sup>266</sup> including agricultural restrictions on existing farmland on the urban fringe. This is particularly true where restrictions are pursuant to careful planning, identifying land most suitable for continued agricultural use in terms of soil type and location.

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County, 294 N.W.2d 654, 656 (S.D. 1980).

<sup>262</sup> See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (“those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end”) (quoting *Federal Housing Authority v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

<sup>263</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>264</sup> See, e.g., *Humbach*, *supra* note 135, at 367–68; *Mandelker*, *supra* note 147, at 233–36; *Michelman*, *supra* note 145, at 415.

<sup>265</sup> See Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 360–61 (1997) (stating that the discovery of endangered species on land “akin to Act of God.”).

<sup>266</sup> See *Lucas*, 505 U.S. at 1027; *Humbach*, *supra* note 135, at 367–68.



In such situations any reasonable landowner expectations must necessarily recognize that prime farmland is subject to possible restriction. As such, downzoning of land to agricultural use, which eliminates previous development opportunities, must fall within the reasonable expectations of landowners and not be seen as unfair.

That such downzoning does not violate fairness concerns is further reflected in the fact that the value of undeveloped property, when zoned for development, should be discounted to reflect the possibility of greater restrictions at a later time.<sup>267</sup> Thus, the purchaser or holder of such property gets the property at a reduced value to reflect the risk of possible regulation. In this manner, investment in undeveloped land inevitably involves a degree of speculation in which the owner of such land receives a degree of windfall when subsequent restrictions are not imposed, and a degree of loss when they are.<sup>268</sup> Losses under such circumstances can hardly be viewed as unfair, especially when the possibility of such regulatory losses can be reasonably anticipated and when in many other circumstances windfalls are received.

## V. CONCLUSION

The last several decades have seen a growing concern over farmland preservation, most clearly reflected in the variety of state and local efforts to address conversion concerns. Although each of these programs has a legitimate role to play in preserving farmland, any serious effort at preservation must ultimately take the power to convert from landowners. Otherwise, no matter how many incentives and protections are afforded landowners, they will eventually succumb to economic pressures to sell. For this reason, agricultural zoning has become a necessary and central component of most efforts to protect farmland.

However, agricultural zoning is controversial, largely because of the significant impact it often imposes on landowners under the greatest conversion pressure. In particular, it is commonly subject to two closely related concerns: that the substantial diminution in value constitutes an unconstitutional taking and, even if constitutional, the substantial economic burdens imposed are unfair.

This Article has shown that, if done pursuant to sound planning, agricultural zoning should not normally constitute a taking or be viewed as inherently unfair, despite substantial economic impacts on owners. Most agricultural zoning should not be a taking under Supreme Court takings jurisprudence, which focuses on whether property remains economically viable and the degree of interference with investment-backed expectations. This has been borne out by lower court decisions, which have typically rejected takings challenges to agricultural zoning. Where land is not suitable for agricultural use, however, courts have appropriately

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<sup>267</sup> See Mandelker, *supra* note 147, at 235–36.

<sup>268</sup> See *id.* at 235–36.

found a taking to exist.

Similarly, agricultural zoning is not inherently unfair even when substantial economic impact exists. Although it might lack the specific reciprocity often seen with other land-use regulations, regulatory impacts must be seen from a broader perspective in which much of the property values were created by government "givings" and in which landowners benefit from other regulatory measures. Moreover, our legal system has long recognized that property ownership is subject to the broader public interest, and reasonable landowner expectations must incorporate the possibility of regulation to further such interests.

Recognition that agricultural zoning is neither a taking nor inherently unfair is not meant to preclude consideration of the compensatory alternatives of PDR and TDR programs, which also deprive the landowner of decisionmaking authority. Although not the focus of this Article, when feasible to implement, such compensatory approaches arguably have two advantages over uncompensated zoning. First, they might give more permanence to the restrictions than zoning, which tends to grant changes with ease, especially when subject to political or developmental pressure. For this reason, zoning is often viewed as an unstable control mechanism, especially when applied to undeveloped land subject to substantial development pressure.<sup>269</sup> In contrast, restrictions pursuant to PDR and TDR programs are more insulated to change pressure, in part because compensation has been provided to the affected landowner.

Second, the PDR and TDR compensatory approaches might at times be a more equitable distribution of the burdens and benefits of preservation. Although, as noted earlier, fairness must be viewed from broad as well as narrow perspectives, PDR and TDR programs arguably more closely align the burdens with the benefits of farmland preservation. Rather than placing the entire burden of regulation on the affected landowner, with the benefits flowing to the public in general, the compensatory approaches spread the cost of regulation to the broader public. With PDRs this is done through increased taxes or other means of revenue raising, such as impact fees, with the cost thus being imposed on local citizens generally or some identifiable segment. The cost shifting of TDR programs is more subtle, with the burden of preservation falling in several possible places, including developers who purchase the TDRs or neighbors in the "receiving" area.<sup>270</sup> Under both the PDR and TDR approaches, however, the cost of

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<sup>269</sup> See MALONE, *supra* note 27 at § 6.08(1); Coughlin & Keene, *supra* note 67 at 9; Michael T. Peddle, *The Effects of Growth Management Policies on Agricultural Land Values*, at 48 in COMPETITION FOR THE LAND 27, 48 (1997); White, *supra* note 7 at 117-18; see also Church, *supra* note 5, at 554 (describing political problems of enforcing zoning restrictions on farmland).

<sup>270</sup> Assuming the restricted landowner sells the TDRs to a developer in a designated "receiving area" who uses them to exceed otherwise applicable limitations, the out of pocket expense falls on the developer. However, the developer is receiving benefits in the form of more intensive development, and therefore the true cost arguably falls on surrounding

preservation is distributed across a broader spectrum of society, which, if not necessarily required by notions of fairness, is nonetheless desirable if it can be achieved.

These modest equity concerns, together with the greater permanence afforded by PDR and TDR programs, suggest that they should be encouraged and pursued when feasible. Indeed, though experience remains limited, there are indications that both types of programs are seeing a slight increase in use. A number of local governments have established PDR or conservation easement programs in recent years.<sup>271</sup> These have received further impetus by provisions of the 1996 Farm Bill, which provided for some matching federal funds for state and local PDR programs.<sup>272</sup> Several successful TDR programs have also been developed specifically for farmland preservation.<sup>273</sup> Perhaps the best known is that in Montgomery County, Maryland, where a successful TDR program designed to preserve farmland has been in place for several years<sup>274</sup> and to date has preserved over 38,000 acres of farmland.<sup>275</sup>

Despite these successes, and despite the advantages of such programs, at the present time both PDR and TDR programs are realistically limited in their potential reach. The obvious problem with PDRs is their cost, which makes them unrealistic for widespread use as a preservation technique, especially in times of

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neighbors who are subject to more intense development than would normally be the cost. If, however, the "receiving area" had been manipulated to be more restrictive than normal to make the TDRs more attractive, then arguably the cost falls on the developer who is paying for development opportunities that would normally have been free absent the TDR program. Cf. Church, *supra* note 5, at 552 n.129 (suggesting problem of manipulating restrictions in "receiving areas" to detriment of property owners in such areas); Fehr, *supra* note 11 (noting that some residents in receiving areas under Montgomery County TDR plan are unhappy about increased density). The developer would likely pass on at least part of that cost to prospective consumers of the development. In either situation, the cost of preservation is shifted from the restricted owner of farmland to some segment of the public.

<sup>271</sup> See White, *supra* note 7, at 140-43 (discussing successful conservation easement program in Lancaster County, Pennsylvania).

<sup>272</sup> See Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

<sup>273</sup> See TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND 179-86 (1996) (describing six different TDR programs designed to preserve farmland).

<sup>274</sup> See Fehr, *supra* note 11 (discussing Montgomery County's TDR program); Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1355-58 (1998) (describing Montgomery County's TDR program).

<sup>275</sup> See American Farmland Trust, *Transfer of Development Rights: Fact Sheet* (last modified Sept. 1998) <<http://Farm.Fic.niu.edu/fic-ta/tafs-tdr.html>>. The New Jersey Pinelands Reserve also has a TDR component to its Management Plan, which as of 1995 had resulted in nearly 13,000 acres of farmland protected through use of TDRs. See White, *supra* note 7, at 139 (describing operation of the New Jersey Pinelands Reserve TDR/Farmland program).

fiscal restraint.<sup>276</sup> TDR programs avoid this problem by providing development rights instead of money, but are contingent on the right mix of ingredients to succeed, including appropriate "receiving areas" that are restrictive enough to make the TDRs valuable and which can easily absorb increased development.<sup>277</sup> Moreover, successful programs require stability of zoning restrictions so that the value of TDRs are not undermined.<sup>278</sup> Thus, the problem of frequent and easy change that threatens the efficiency of zoning as a preservation technique similarly undermines the feasibility of TDR programs.

For these reasons, PDR and TDR programs will play only a limited role in farmland preservation in the immediate future,<sup>279</sup> with agricultural zoning necessarily playing a central role in most preservation efforts. Despite the potential problem of instability, zoning provides a realistic preservation mechanism for local governments truly committed to that goal. If done pursuant to sound planning, such zoning should not pose constitutional concerns nor be inherently unfair to those affected.

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<sup>276</sup> The fiscal restraints of PDR programs have been noted by numerous commentators. See, e.g., MALONE, *supra* note 27, § 6.11(2); REDFIELD, *supra* note 5, at 99–100; Church, *supra* note 5, at 545–46; Teri E. Popp, *A Survey of Agricultural Zoning: State Responses to the Farmland Crisis*, 24 REAL PROP. PROB. & TRUST J. 371, 378–79 (1998); White, *supra* note 7, at 141.

<sup>277</sup> See, e.g., DANIEL & BOWERS, *supra* note 273, at 187–90 (discussing various barriers to successful TDR programs); Kayden, *supra* note 90, at 574–79.

<sup>278</sup> See, e.g., Kayden, *supra* note 90, at 578.

<sup>279</sup> The actual amount of farmland preserved under PDR and TDR programs, though growing, is still quite limited. The website for the Center for Agriculture and the Environment (CAE) has a table documenting local governments with TDR programs as of 1997 and the amount of farmland actually preserved through such programs. Although several local governmental bodies, such as Montgomery County, Maryland, have protected significant amounts of land, the total is less than 70,000 acres, more than half of which comes from Montgomery County alone. See American Farmland Trust, *Transfer of Development Rights: Fact Sheet* (last modified Sept. 1998) <<http://Farm.Fic.niu.edu/fic-ta/tafs-tdr.html>>. PDR programs have shown greater success, with the CAE listing 406,725 acres of farmland that have been preserved through PDR programs. See *id.*